Municipal Police Training Committee
In-Service Training Program
Training Year 2021-2022

Legal Update Manual

This document is intended to serve as a training tool for police officers to review relevant legislation and case law that has been issued from the United States Supreme Court, the Supreme Judicial Court and the Appeals Court of Massachusetts over the course of the past year. This manual is not intended to serve as a criminal law or criminal procedure book. For specific guidance on the application of these cases or any law, please consult with your supervisor, your department's legal advisor, or prosecutor. Additionally, please remember that many cases are fact specific and contain variations that make it difficult for the courts to establish bright line rules for policing. Please direct questions and comments to:

Denise S. Flagg
Legal Issues Coordinator
Municipal Police Training Committee
42 Thomas Patten Drive
Randolph, MA 02368
telephone: 781 437-0319
denise.s.flagg@mass.gov

This manual incorporates cases decided through June 15, 2021. Relevant legal updates are posted throughout the year to the MPTC website: mass.gov/MPTC and are available there for review.

Acknowledgements

The MPTC acknowledges and appreciates the input and contributions of the following individuals in the preparation of the Legal Update manual for the in-service training program for the 2021-2022 training year.

Sgt. Kevin Amaral
Brockton Police Department

Chief A. Kevin Kennedy
Lincoln Police Department

James Mulcahy, Esq.
Acting Director of Professional Standards
Cambridge Police Department

Sgt. George Neilson (Ret.)
Dedham Police Department

Joseph Pieropan, Esq.
Assistant District Attorney
Berkshire and Hampden Counties District Attorneys' Offices

Lt. James Raso
Lawrence Police Department

TABLE OF CONTENTS

CONSTITUTIONAL LAW

CRIMINAL LAW

POLICE REFORM

CONSTITUTIONAL LAW

FIRST AMENDMENT: FREEDOM OF SPEECH

This year the courts decided two (2) cases alleging that Massachusetts statutes were unconstitutional because they violated the freedom of speech protections of the First Amendment. When deciding whether a statute is unconstitutional, the courts consider several questions:

1. Does the statute violate an individual's freedom of speech?
   If so, does the statute on its face violate the constitution or does it only violate the constitution when the statute is applied in certain circumstances?

2. Is there a legitimate state interest that is served by the statute?
   If so, is the statute narrowly drafted so that it adequately addresses the legitimate governmental interest but its impact on the First Amendment is minimized as much as possible?

After considering these questions, the court has three (3) options:

(1) declare that the statute does not violate the First Amendment;
(2) find that the statute is unconstitutional on its face; or
(3) find that the statute is unconstitutional when applied to specific circumstances.

THE MASSACHUSETTS WIRETAP STATUTE IS UNCONSTITUIONAL WHEN APPLIED TO SECRET RECORDINGS OF POLICE OFFICERS IN THE PERFORMANCE OF THEIR DUTIES IN PUBLIC

Project Veritas Action Fund, et al. v. Rollins, 982 F.3d 813 (1st Cir. 2020).

Facts

The plaintiffs are civil rights activists whose activities routinely include openly recording police officers without their consent as they perform official duties in public. The plaintiffs filed the complaint against the Boston Police Department and the Suffolk County District Attorney's office because they wanted to secretly record police officers as the officers perform official duties in public. The plaintiffs feared that they would face criminal prosecution under the Massachusetts wiretap statute, MGL c 272 § 99, if they did so. The plaintiffs' complaint asked the court to declare that the Massachusetts wiretap statute violates the First and Fourteenth Amendments to the United States Constitution when it is applied to secretly recording police officers engaged in their official duties in public places.

Discussion
The Massachusetts wiretap statute, MGL c 272 § 99, states in relevant part:

> "Except as otherwise specifically provided in this section any person who willfully commits an interception, attempts to commit an interception, or procures any other person to commit an interception or to attempt to commit an interception of any wire or oral communication shall (be punished)."

The statute also penalized the disclosure or use of such intercepted communication. According to the statute:

> "Interception means to secretly hear, secretly record, or aid another to secretly hear or secretly record the contents of any wire or oral communication through the use of any intercepting device by any person other than a person given prior authority by all parties to such communication…"

Issue
Does the protection of the First Amendment apply to people making secret recordings of police officers?

Short answer
Yes. Freedom of speech includes the right to gather information about public officials. The First Amendment has an interest in promoting the "free discussion of government affairs" and gathering of information furthers that interest. The court found this to be particularly true when collecting information with respect to law enforcement officers.

Discussion
The courts have previously addressed the issue of recording police officers. In Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011) the court recognized the First Amendment guarantee of freedom of speech protects an individual's right to record government officials discharging their duties in public spaces even when the official does not consent to being recorded.

The finding in Glik was extended in Gericke v. Begin, 753 F.3d 1 (1st Cir. 2014). In Gericke, a person that was pulled over by the police for a traffic stop tried to record the officer during the traffic stop. Even though the traffic stop occurred at the side of a highway and not in a place one would traditionally think of as a place of First Amendment expression, the court found that this recording warranted at least some of the protection of the First Amendment because it amounts to newsgathering.

Both Glik and Gericke involved the open recording of police officers without their consent. The court found that the logic that supports protecting recordings made in situations such as Glik and Gericke should apply to secret recordings as well.

"In sum, a citizen's audio recording of on-duty police officers' treatment of civilians in public spaces while carrying out their official duties, even when conducted without an

officer's knowledge, can constitute newsgathering every bit as much as a credentialed reporter's after-the-fact efforts to ascertain what had transpired." p. 833.

Issue
Is there a legitimate governmental interest that is served by the statute?

Short answer
Yes, the court recognized the government's interest in preventing unlawful interference with the performance of their official duties and protecting the privacy of its citizens.

Discussion
Officers have a legitimate interest in maintaining public safety and preventing unlawful interference with the performance of their job. The court noted that there may be situations in which a police order that is specifically directed at the recording of the officer will be justified, but only if the officer reasonably concluded that the recording was interfering or was about to interfere with the officer's performance of their duties.

The court did not find that this governmental interest was furthered by the language of the statute. The court found that the wiretap statute, as written, did not help reduce interference with the performance of police duties in any meaningful way when an officer is being secretly recorded while performing those duties.

The court also recognized the government's interest in protecting the privacy of individuals who may be secretly recorded when they are dealing with the police. The court was not overly concerned with this issue. "But, as a general matter, an individual's privacy interests are hardly at their zenith in speaking audibly in a public space within earshot of a police officer." p. 839.

Even when there are legitimate governmental interests, the language of the statute must be narrowly tailored to address those interests. In this case, the language of the statute is not narrowly tailored and cannot stand, at least with respect to the right of private individuals to secretly record officers in the performance of their duties in public places.

Conclusion
The Massachusetts wiretap statute is unconstitutional when applied to individuals who secretly record officers in the performance of their duties in public places. This means that individuals who secretly record officers in such situations cannot be charged with a violation of the Massachusetts wiretap statute.

THE MASSACHUSETTS PANHANDLING STATUTE (MGL C 85 §17A) IS UNCONSTITUTIONAL

Massachusetts Coalition for the Homeless v. City of Fall River, 486 Mass. 437 (2020).

Facts
The plaintiffs in this case are two (2) homeless men who are members of the Massachusetts Coalition for the Homeless. In order to provide for their basic needs, the men sometimes stand by the side of the public streets in Fall River with signs saying they are homeless and they accept donations from passers-by.

From 2018 – 2019 the Fall River Police Department filed over forty (40) complaints against the two (2) men. The plaintiffs filed suit against the city asking the court to declare that the statute violated their right to free speech guaranteed by the First Amendment of the United States Constitution and art. 16 of the Massachusetts Declaration of Rights.

Discussion
MGL c. 85 § 17A, sometimes referred to as the panhandling statute provides:

> "Whoever, for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise, except newspapers, or ticket of admission to any game, show, exhibition, fair, ball, entertainment or public gathering, signals a moving vehicle on any public way or causes the stopping of a vehicle thereon, or accosts any occupant of a vehicle stopped thereon at the direction of a police officer or signal man, or of a signal or device for regulating traffic, shall be punished by a fine of not more than fifty dollars. Whoever sells or offers for sale any item except newspapers within the limits of a state highway boundary without a permit issued by the department shall for the first offense be punished by a fine of fifty dollars and for each subsequent offense shall be punished by a fine of one hundred dollars. Notwithstanding the provisions of the first sentence of this section, on any city or town way which is not under jurisdiction of the department, the chief of police of a city or town may issue a permit to nonprofit organizations to solicit on said ways in conformity with the rules and regulations established by the police department of said city or town."

Issue
Does the statute violate an individual's freedom of speech?

Short answer
Yes. Soliciting contributions is expressive activity and therefore protected by the First Amendment.

Discussion
The statute as written violates the freedom of speech because it penalizes an activity if it is done for certain purposes, but not for others. For instance, the statute penalized people for signaling or stopping traffic for purposes of panhandling but allows the same behavior if the purpose is to sell newspapers. This is known as a content-based regulation.

Issue
Is there a compelling state interest that is served by the statute?

Short answer
Yes, the state has a valid interest in protecting public safety on its ways.

Certainly having people on the side of a road soliciting cars to stop may cause a public safety concern. The question then becomes, is the statute narrowly drafted so that it adequately addresses the legitimate governmental interest but its impact on the First Amendment is minimized as much as possible?

The court found that the statute as written was not narrowly drafted in that it was overinclusive and underinclusive. The statute is overinclusive because it applies to all public ways with no regard to whether the expressive conduct would actually pose a threat to traffic safety in that particular area. It also prohibits behaviors that may not pose a safety risk at all. In addition, the statute does not require that the person interfere with traffic to be in violation of the statute. As currently written, the statute applies to someone standing quietly on the side of the road with a sign asking for spare change.

The statute is underinclusive because it is a content-based regulation, meaning that whether conduct is prohibited is dependent on the purpose of that conduct. Public safety is not furthered by prohibiting expressive activity depending solely on the purpose of the activity. For example, signaling motor vehicles to stop on the side of the road is not more dangerous because the person is seeking donations to benefit themselves rather than selling newspapers. Both activities are equally dangerous so the statute should apply equally to them.

Conclusion
The Supreme Judicial Court declared that the statute violated both the First Amendment and art. 16 and is therefore unconstitutional.

FOURTH AMENDMENT: SEARCH AND SEIZURE

SEARCH WARRANTS - STALENESS

THE COURT WILL CONSIDER WHETHER SOMEONE IS A "COLLECTOR" OF CHILD PORNOGRAPHY WHEN DETERMING WHETHER THE INFORMATION IN THE SEARCH WARRANT IS STALE

Commonwealth v. Guastucci, 486 Mass. 22 (2020).

Facts
In March 2017, Skype filed a report with the National Center for Missing and Exploited Children (NCMEC) about a digital image that was uploaded that was believed to be child

pornography. Skype is an electronic service provider that allows customers to share videos, pictures and to "chat" via typed messages that are exchanged interactively. At some point, NCMEC provided the information to the State Police, which included the screen name and Internet Service Protocol (IP) address that uploaded the image. In May 2017 the internet provider responded to an administrative subpoena issued by the Massachusetts Attorney General's office providing the subscriber name (the defendant's spouse) and a service address in Tyngsboro.

In September, a State Trooper viewed the image and confirmed it was child pornography. In October, the State Trooper obtained a warrant to search the computers and digital storage devices located at the address in Tynsgboro. The affidavit in support of the warrant included information about the investigation and the State Trooper:

> "averred that '[t]hose who have possessed and/or disseminated child pornography have an interest or preference in the sexual activity of children' and are 'likely to keep secreted, but readily at hand, sexually explicit visual images depicting children.... These depictions tend to be extremely important to such individuals and are likely to remain in the possession of or under control of such an individual for extensive time periods.'" p. 24.

Police executed the search warrant and seized a laptop computer and a flash drive. Both items were owned by the defendant and contained images of child pornography.

The defendant moved to suppress the evidence seized during the execution of the search warrant. The sole question before the court was whether the passage of seven (7) months between when the image was uploaded to Skype and the application for the search warrant rendered the information so stale that the warrant lacked probable cause. The court found that, although the seven (7) month delay may have been at the "outer limit", the affidavit was not stale.

Discussion

The court noted that there is no bright-line test for staleness. Each case must be determined on its own facts. To determine staleness, the court will look at two (2) factors:

> (1) the nature of the criminal activity under investigation; and
>
> (2) the nature of the item to be seized.

Nature of the criminal activity

Probable cause to search for items related to crimes like narcotic offenses dwindle rapidly as time passes because those items are readily consumed or distributed. Time is of less importance when affidavits contain information about ongoing or protracted criminal activity.

Nature of the item to be seized

Items typically fall into one (1) of two (2) categories. Information about an item that is perishable, readily disposable or transferable will become stale quickly and may not provide probable cause to believe the item will be found in the area to be searched even a few days later. "On the other hand, an item that is durable, of enduring use to its holder, and not inherently incriminating might reasonably be found in the same location several weeks later." p. 28.

The court warns that "[e]very investigation, including the possession and distribution of child pornography, has a shelf life." p. 30. In every case, the government is still bound by the requirements of the Fourth Amendment and art. 14 of the Massachusetts Declaration of Rights. The court notes that the question of staleness as it relates to child pornography is unique. Child pornography would not generally fall into the more fleeting category of criminal activity because it is believed that "individuals who are interested in child pornography are likely to collect and retain such images in the privacy of their own homes." p. 29. The court found that it is necessary to draw a distinction between someone who is interested in child pornography and one who saw it negligently or inadvertently.

The court found that it is not reasonable to infer that all possessors of child pornography are collectors.

> "Crucially, however, the value of that inference [that an individual who is interested in child pornography will retain images of child pornography for lengthy periods of time] in any given case depends on the preliminary finding that the suspect is a person 'interested in' images of child pornography." p. 30 *quoting* United States v. Raymonda, 780 F.3d 105, 114 (2nd Cir. 2015).

The court identified several factors that would be sufficient to trigger the inference that an individual is a collector of child pornography and would likely retain the images including: evidence that the individual is a pedophile, had paid subscriptions to child pornography sites, participated in file sharing, or had a history of possessing or receiving child pornography. It is also reasonable to infer that someone is a collector of child pornography in other circumstances. For instance, if the item was obtained through a series of complicated steps that would infer a deliberate or willful intention to view the item rather than by accident or neglect. An inference that someone is a collector could be made if the possessor redistributes the file.

Here the image was uploaded to Skype, an internet service designed for communication and file sharing. The court found this was substantially different from someone uploading a file to a storage service such as "Dropbox" or "iCloud". Based upon the number of steps that would have been required to upload the file onto Skype, the court found that it was unlikely that the defendant stumbled upon the image inadvertently or negligently and then promptly closed the file and deleted it.

Based upon the facts of this case, " it was reasonable for the magistrate to infer that the computer user "live: boullett_1" possessed a digital image of child pornography, intentionally accessed this image, and distributed it to another person by uploading the file to Skype." p. 33.

SEARCH WARRANT – NEXUS TO CELL PHONE

SEARCH WARRANTS FOR CELL PHONES MUST HAVE A TEMPORAL LIMIT

Commonwealth v. Snow, 486 Mass. 582 (2021).

Facts

On December 5, 2015, the victim was shot several times on a street in Boston and died. The shooter fled the area in a car driven by another person. A witness saw a car that matched the description of the get-away car drive down a dead-end street and saw its occupants moving about as if changing clothes. This witness called the police who arrived and found the car with three (3) occupants. The defendant was sitting in the driver's seat and the front seat passenger matched the description of the shooter. All of the occupants were ordered out of the car. The defendant was talking on his cell phone to his girlfriend as he exited the vehicle. The officers seized the phone. The defendant told officers the car was rented to his girlfriend and asked repeatedly during booking how she could get it back.

Police interviewed the girlfriend the next day. She told police that the defendant called her to let her know he was being arrested. She also provided an "improbable explanation" for why she rented the car. The girlfriend owned her own car and told the police that she rented the Nissan Altima at issue here, and not a van or truck, to assist her with a move to Fall River. She also had no explanation for why she had rented a car earlier in the week but had exchanged it for the Altima on the day of the murder.

As part of the investigation, officers recovered and searched the victim's cell phone. They found violent and threatening text messages exchanged between the victim and a contact believed to be the front seat passenger of the car. Witnesses confirmed that the victim and the front seat passenger had been arguing over social media and text in the days leading up to the murder.

Police obtained a search warrant for the defendant's phone on February 23, 2016. The search warrant requested permission to search the phone for the following information:

> "Cellular telephone number; electronic serial number, international mobile equipment identity, mobile equipment identifier or other similar identification number; address book; contact list; personal calendar, date book entries, and to-do lists; saved, opened, unopened, draft, sent, and deleted electronic mail; incoming, outgoing, draft, and deleted text messages and video messages; history of calls sent, received, and missed; any voicemail messages, including those that are

> opened, unopened, saved, or deleted; GPS information; mobile instant message chat logs, data and contact information; internet browser history; and any and all of the fruits or instrumentalities of the crime of Murder." p. 585.

The officer did not put in any time limitation or restriction on the information to be searched because it was unknown when the weapon that was used to shoot the victim was acquired and when any potential conspiracy related to the shooting may have been formed.

Issue

Did the affidavit provide the necessary nexus between the phone to be searched and the criminal activity?

Short answer

Yes. The affidavit submitted in support of the warrant to search the defendant's phone provided a substantial basis to believe that the defendant was a co-venturer to a homicide and it was reasonable to expect his cell phone would contain evidence related to that crime.

Discussion

> "The government must show not only that there is probable cause to believe an individual committed a crime but also that there is a 'nexus' between the alleged crime and the article to be searched or seized." p. 586.

The court found that there was evidence that the crime was planned in advance. That evidence included the witness who saw the people in the car moving around as if they were changing their clothes and the police found extra clothes in the car. This would support a belief that the crime was planned at least far enough in advance for people to pack a change of clothes. The court also relied on the prior text communications between the front seat passenger and the victim of the shooting.

The court also found that it was probable that the defendant used the phone to call his girlfriend as he was exiting the car because he was concerned that the car contained evidence of the crime. To reach this conclusion, the court pointed to the fact that the girlfriend had an "improbable" explanation for why she rented the car and the defendant's concern at booking that the girlfriend be able to retrieve the car to avoid a late return fee. The court found it unlikely that the defendant, when he was about to be arrested on a murder charge, would be calling his girlfriend to avoid a late return fee on a rental car.

> "Given these facts, one could infer from the affidavit that the call was related to the crime, that the crime was preplanned, and that some of that planning may have utilized cell phones, including the defendant's." p. 588.

The court cautions that none of the facts standing alone would be sufficient to provide a nexus between the crime and the defendant's phone. The court specifically noted that the defendant's use of the phone as he was exiting the car would not have been enough, without more, to provide the necessary nexus.

> "Even though using a cell phone while fleeing the scene of a crime may lend support to an inference that the communication is about the crime, using a cell phone just prior to or during an arrest, in and of itself, does not." p. 589.

Using a cell phone when someone is about to be arrested by police does not, without more, create a nexus to search the phone.

The court made clear that the decision in this case does not disturb its holding in Commonwealth v. White, 475 Mass. 583 (2016) where the court,

> "held that to support a nexus between a crime and a cell phone, the Commonwealth needed more than evidence of a joint venture crime and the opinion of investigating officers that coventurers often use cell phones to communicate." p. 589.

Here nexus was established because, in addition to all of the participants having cell phones, the defendant made a call soon after the shooting to the person who had rented the getaway car, there was evidence that the crime was preplanned, and the records of phone communications between the victim and the coventurer showed an ongoing dispute. These additional facts made it reasonable to infer that the defendant's phone would contain evidence of the crime.

Issue
Was the affidavit particular enough to properly limit the scope of the search?

Short answer
No. The search warrant in this case lacked particularity because it allowed officers to search virtually all areas of the cell phone without any date restriction.

Discussion
A search warrant must state with particularity the place or area to be searched and the item(s) to be seized. A warrant that fails to do so is improper in scope.

Based upon the facts of this case, the court found that police had probable cause to search the phone for evidence of the joint venture which would include any area or file of the phone that contains communications, including photographs.

> "Consequently, when looking for evidence relating to the planning and coordination of a joint venture, it was proper here for the officers to search call logs, text messages, and Snapchat video recordings." p. 593.

In addition to limiting the areas or files of a phone that can be searched, a search warrant for a cell phone must contain a temporal limit. "The magnitude of the privacy invasion of a cell phone search utterly lacking in temporal limits cannot be overstated." p. 593. "Consequently, to be sufficiently particular, a warrant for a cell phone search presumptively must contain some temporal limit." p. 594.

The court did not give any guidance on what an appropriate temporal limit might be because each case requires a fact intensive inquiry. The court did note that temporal restriction in an initial search warrant should err on the side of narrowness because nothing precludes officers from seeking an additional warrant based upon information they obtain from the first warrant. With respect to the facts of this case, the court found that,

> "a feud beginning mere days before, and a car being borrowed earlier in the day do not support a reasonable inference that evidence related to the crime could be found in the defendant's cell phone data from years, months or even weeks before the murder." p. 595.

This case was remanded to the Superior Court for further proceedings.

SEARCH WARRANTS – NEXUS TO RENTAL CAR

A SEARCH WARRANT AFFIDAVIT CAN ESTABLISH PROBABLE CAUSE TO SEARCH MORE THAN ONE PLACE

Commonwealth v. DeFrancesco, 99 Mass.App.Ct. 208 (2021).

Facts

Police were conducting a drug distribution investigation that led them to apply for a search warrant for the defendant's apartment and a rental car. The affidavit submitted in support of the search warrant indicated that a confidential informant (CI) provided information about "J" selling crack cocaine and CI buying drugs from "J" by using a specific telephone number. The affidavit provided the following information regarding the investigation:

> On August 8, 2017, CI initiated a controlled buy by calling the defendant. CI went to the meet location where a dark gray Ford fusion arrived. The CI met with the occupant of the Fusion for a short period of time. The CI turned over cocaine he had purchased from "J" to the police. The Fusion was registered to a rental company and rented to Joseph Dmitruk.
>
> On August 10, 2017, the Fusion was the subject of a traffic stop by another officer. During that traffic stop, the officer saw the driver and passenger switch positions. The defendant was the original driver. Through further investigation, police learned the address of the defendant and obtained his photo. Two (2) photos were shown to CI who confirmed that the defendant was "J".

> On August 14, 2017, the police learned that the Fusion was returned to the rental company and Dmitruk had rented a Nissan Altima. Two (2) days later, the detective saw the defendant leave the house and get into an Altima that was parked across the street from the defendant's residence.
>
> On August 22, 2017, the detective saw the defendant leave the house, back the Altima into the driveway and then go back inside the house. Twenty-five (25) minutes later the Altima left the driveway. The affidavit did not provide information as to who the driver was. The car drove to a playground where another officer saw a man get into the front passenger seat for a moment and then leave in his own car. The Altima drove away at a fast rate of speed. The detective, an experienced narcotics detective, opined that a narcotics transaction had occurred between the driver and the unidentified man.
>
> On September 7, 2017, the detective saw a third rental car, a Nissan Rogue parked across the street from the house. It was registered to the same rental company and rented to Dmitruk.
>
> The CI made two (2) other controlled buys, one on September 8, 2017 and one on September 10, 2017. On both occasions, CI arranged the deal by phone and police observed the defendant leave the residence, get into the Rogue, and drive to the meet location. On both occasions, CI met briefly with the defendant and then provided the detective with the cocaine that was purchased from the defendant.

Based upon the investigation, the detective opined that the defendant was storing illegal narcotics such as cocaine in his apartment and/or in the Rogue. The detective applied for search warrants which were issued. Officers executed the search warrants on September 14, 2017. Officers seized fentanyl, cocaine, a gun case, four (4) empty ammunition magazines and documents bearing the defendant's name in the Rogue.

The defendant filed a motion to suppress the evidence seized from the Rogue. The defendant argued that the police failed to establish a nexus between the cocaine and the rented Rogue.

Discussion

The court found that the search warrant affidavit demonstrated that the defendant engaged in an ongoing business of selling narcotics illegally and had access to a supply of narcotics to sell. The court based this determination on the fact that CI told the detective that the defendant was selling cocaine, CI had bought drugs from the defendant in the past, and the three (3) controlled buys, two (2) of which occurred within a week of the execution of the search warrant.

The court also found that the search warrant affidavit established that the defendant was using the Rogue in connection with his drug distribution business. The court noted that the affidavits did not explicitly say that the buys took place inside the Rogue; however, it

was reasonable to infer that they did because both of the controlled buys that involved the Rogue described the CI meeting for a "brief moment" with the operator of the Rogue. The inference is bolstered by the observations officers made on August 22, 2017 in which an unidentified male got into the front passenger seat of the rented Altima for a brief moment during which the detective believed a narcotics transaction took place.

> "Interpreted in a common sense fashion, the affidavit provided the magistrate with probable cause to conclude that drug sales occurred inside each of the rental cars the defendant drove. Even if the affidavit left open the possibility that the defendant did not conduct transactions inside those cars, there was still probable cause to conclude that he used those cars, including the Rogue, to transport cocaine to the location of each sale to CI." p. 212-213.

The search warrant also established probable cause to believe that a controlled substance and evidence related to drug distribution would be found in the Rogue and not, as the motion judge concluded, exclusively in the defendant's home. A search warrant affidavit can establish probable cause to believe an item or items will be found in more than one location. This is especially true when the evidence being searched for is easily dispersed, such as drugs.

> "Probable cause does not require proof that it is more likely than not that evidence would be found in the Rogue, rather, it requires a quantum of proof from which the magistrate can conclude, applying common sense and reasonable inferences, that evidence is 'reasonably likely' to be found in the Rogue." p. 213.

The court also addressed that, while there may be a general inference that most people would not keep valuables such as a supply of drugs in a vehicle parked on a street, such an inference was not warranted here because of the defendant's efforts to conceal his connection to the vehicles he used in his drug trade. In just over a month, the defendant used three (3) different rental cars, all of which were rented in another person's name, when the car was stopped by police on August 11, the defendant switched seats with his passenger, and within days of that motor vehicle stop, the Fusion was exchanged for another car. These facts strongly suggest that the defendant was attempting to conceal his connection to the rental cars.

The court found that the investigation here was thorough and recent. In addition, the court relied on the detective's opinion contained in the affidavit that stated that, based in part on his extensive training and experience in narcotics investigations, the defendant was storing illegal narcotics within the Rogue.

> "The magistrate properly concluded that [the detectives]'s affidavit set forth a timely nexus between the defendant's drug activity and the Rogue, such that probable cause existed to believe that evidence of his cocaine dealing would be found there." p. 211.

The motion to suppress was properly denied.

SEARCH WARRANT – NEXUS TO APARTMENT IN MULTI-UNIT BUILDING

TO BE VALID, A SEARCH WARRANT BASED UPON DRUG DEALING OUTSIDE THE HOME MUST ESTABLISH A NEXUS BETWEEN THE HOME AND THE DRUG DEALING

Commonwealth v. Diaz-Arias, 98 Mass.App.Ct. 504 (2020).

Facts

After an extensive narcotics investigation that included eight (8) controlled buys, officers applied for a search warrant for the defendant's apartment. The affidavit submitted in support of the warrant detailed the facts of the investigation which had focused on an individual named Carlos. During the investigation, officers observed Carlos routinely drive from Lawrence to a multi-unit apartment building in Dorchester where the defendant lived, go into the building for a brief period of time and then drive around making drug deals. Officers observed the defendant drive Carlos to two (2) of the controlled buys. During the investigation, officers also saw the defendant with Carlos outside the address, had seen the defendant go into the building, saw the defendant's car parked in the parking lot for that building, and learned that the utility provider Eversouce listed the defendant as the customer responsible for the utilities for Apartment 2R of that building.

The affidavit also detailed a ruse used by the officers to confirm the apartment Carlos was going to. The ruse involved an officer dressing as a National Grid gas company employee and approaching Carlos as he was leaving the building. The officer asked if Carlos smelled gas. Carlos said he did not smell gas and then led officers into the building through two (2) locked doors. At the door to apartment 2R, Carlos said that he lived there, made a phone call, and then the door was opened by the defendant. The officer remained in the hallway and had a brief conversation with the defendant as he stood in the doorway of the apartment.

The search warrant for apartment 2R was issued. When officers executed the warrant, they found the defendant, a female and an infant in the apartment. The defendant was provided with Miranda warnings in Spanish, his native language. The defendant was told that the officers had a search warrant and were looking for drugs. He was also told that it would be "easier" if the defendant showed them where the drugs were kept. The defendant initially denied having any drugs. The officers then told him that if they found drugs that the female would also be "liable." The defendant then showed officers a box in the kitchen where fentanyl was found. The defendant said he paid $1,000.00 for the fentanyl.

The defendant moved to suppress the drugs and the statements he made on scene. The defendant argued that the affidavit did not establish probable cause to search the apartment.

Discussion

Nexus between drug dealing and the defendant's apartment

Probable cause is not certainty nor does it require a showing that evidence would more likely than not be found in the place to be searched. "The question is whether the affidavit established probable cause to believe that relevant evidence of the alleged criminal activity would likely be found in the apartment." p. 508.

The court found there was probable cause to issue the warrant in this case. The affidavit showed that Carlos was a drug dealer who conducted his business by driving to various locations and selling the drugs. The affidavit also showed that Carlos did not live at the address in question, but that he routinely went to that building, entered it for a brief period of time and would leave to drive to various drug deals.

> "Nothing more was required to establish probable cause to believe that Carlos was using some location within 289 Hancock Street as a staging point for the drug distribution - - it is readily and 'practically' knowable or inferable from the extensive facts in the warrant affidavit." p. 509.

The court found that the information in the affidavit also established probable cause to search apartment 2R specifically. The affidavit established that the defendant, who was observed dealing drugs with Carlos, likely lived at that address because he regularly parked his car there, was seen outside with Carlos, and, the court found "[m]ost importantly, the defendant was the named party on the utility bill for that apartment." p. 509.

> "A person who is responsible for utilities is reasonably likely to be found at that property, at least some of the time. Indeed, utility bills are accepted in Massachusetts as one type of proof that the named payor resides in the Commonwealth - - for purposes of, for example, obtaining a driver's license." pp. 509-510.

The facts of this case were enough to reasonably infer that when Carlos went to the address in Dorchester, that he was specifically going to the defendant's apartment.

The court cautioned that evidence that someone is engaged in dealing drugs outside their residence will not be enough, standing alone, to justify a search of the person's residence. The court further noted that, in this case, there was information contained in the affidavit to establish a nexus between the drug dealing activity and the residence.

> "As noted, surveillance showed that Carlos did not sleep at the building but that his drug distribution regularly began from the building, and that he often returned there during the day. While one might imagine an innocent explanation for the observed behavior, one does not have to indulge the innocent explanations in evaluating probable cause." p. 510.

NOTE: the defendant argued that the ruse used by the police was unconstitutional. The court did not reach the issue because the court found that there was probable cause to issue the warrant without the information about the ruse. In a footnote, the court cautioned that consent given when a ruse involves the suggestion of imminent risk to a person's safety may not be valid.

Voluntariness of statements

The defendant also argued that his statements to the police should be suppressed because they were not voluntary.

> "When in police custody, a defendant must be given Miranda warnings before being interrogated, and waiver of those rights must be knowing and voluntary. Separately, the Commonwealth must show that any incriminating statements were made knowingly and voluntary." p. 510 (citations omitted).

The defendant argued that his waiver of those rights was not voluntary because of the "threats" made against his wife. When determining whether a waiver of Miranda rights is voluntary, the court will look at the totality of the circumstances and consider whether, "the will of the defendant was overborne to the extent that the statement was not the result of a free and voluntary act." p. 511 *quoting* Commonwealth v. Monroe, 472 Mass. 461 (2015).

There is no blanket prohibition against the police telling a suspect that their family member may face criminal charges. In Commonwealth v. Raymond, 424 Mass. 382 (1997), the defendant confessed after police told him that his mother would be charged as an accessory after the fact to the murder. The confession was deemed voluntary in that case.

> "While the police may not expressly bargain with the defendant over the release of other individuals to make threats of arresting and charging others with no basis, where this type of conduct is absent, the police may bring to the defendant's attention the possibility that his relatives may be culpable." Raymond at 396.

In this case, the investigation showed that there was a drug dealing operation likely being organized from that apartment, and that Carlos regularly came and went from the apartment as part of that drug dealing operation. In addition,

> "[u]pon executing the warrant the police also learned that the wife evidently resided in that apartment, and likely would have been present for whatever activities occurred there, including Carlos's comings and goings. The police may not have known that the defendant's wife was involved (and presence alone would not establish criminality) but their investigation was ongoing, and again, we are in the realm of reasonable inferences; under the circumstances it was not improper for them to suggest that the wife could be involved in drugs possession or distribution." 512.

Based upon the totality of the circumstances of this case, the court found that the statements were voluntary.

> "The defendant is an adult, who received his Miranda warning and confirmed that he understood them. There was no indication that he lacked the ability to understand the officer's questions, or to answer them. The defendant initially denied having any drugs. The officers then made essentially one statement – in effect threating the defendant that if he did not cooperate, his wife would or could also be "liable." The defendant then immediately began showing the officer the drugs." 513.

The motion to suppress should have been denied.

WARRANTLESS SEARCH – AUTOMOBILE EXCEPTION

POLICE AUTHORIZED TO SEARCH CAR WHEN INVESTIGATION ESTABLISHED NEXUS BETWEEN THE CAR AND NARCOTICS DEALING

Commonwealth v. Ortiz, SJC-12975 (June 8, 2021).

Facts

In February 2018, the Springfield Police Department was investigating the sale of narcotics by the defendant and his brother. The base of operation for the drug dealing was a specific apartment on Niagara Street.

On February 15, 2018, an undercover officer (UC) called the defendant who agreed to sell narcotics to the UC. The UC was directed by the defendant to go to a gas station two (2) blocks away from the target apartment. This gas station was one (1) of several areas placed under surveillance by police as part of the investigation that day. An Acura that was of interest to the investigators was parked near the apartment and was also under surveillance that day.

Surveillance officers saw the defendant drive up to the Acura in a Honda. As the defendant approached the Acura on foot, the rear lights flashed as though the car was being unlocked remotely. The defendant opened the driver's side door, reached toward the rear seat area, retrieved a traffic vest and then walked away from the Acura. The rear lights flashed again. The defendant got in the Honda and drove away. Shortly after that, the defendant pulled into the gas station where the UC had been waiting for ten (10) minutes. The UC was directed to get into the defendant's car where UC purchased twenty (20) bags of heroin. After the sale, the UC left the car and other officers stopped the defendant and he was arrested. During a search of the Honda officers recovered the driver's license of the defendant's brother. Officers did not recover a remote key for the Acura.

Officers went back to the Acura and were approached by the defendant's brother. He was arrested. At the time of his arrest, he was holding a remote key for the Acura. Officers unlocked the Acura and recovered 200 bags of heroin.

The defendant argues that the police lacked probable cause to search the Acura and the evidence seized from it should be suppressed.

> "The defendant contends that his 'single' and 'enigmatic' stop of the Acura – which was not the location of the suspected base of narcotic operations – did not provide police with a reasonable basis for believing that contraband would be found in the vehicle."

Discussion

> "Warrantless searches are presumptively unreasonable under both the Fourth Amendment to the Unites States Constitution and art. 14 of the Massachusetts Declaration of Rights. There are exceptions. Because the inherent mobility of automobiles creates an exigency that they, and the contraband there is probable cause to believe they contain, can quickly be moved away while a warrant is being sought, less stringent warrant requirement have been applied to vehicles." (quotations and citations omitted.)

The question before the court in this case was whether the Commonwealth had established a sufficient nexus between the drug activity and the Acura to believe that narcotics would be found in the Acura. In other words, was there probable cause to believe that the Acura would contain narcotics?

> "Probable cause exists if the information available to police provides a substantial basis for concluding that evidence connected to the crime will be found in the specified location." (quotations and citations omitted.)

In this case, the officers knew that the defendant and his brother were selling narcotics together. On the date in question, the defendant agreed to sell drugs to the UC and he directed UC "through some intermediate, circuitous instructions" ultimately having UC go to a gas station just two (2) blocks from the target apartment. The defendant had the UC wait in his car for ten (10) minutes. Prior to meeting up with the UC, the defendant drove to the Acura, which was unlocked remotely as he approached it even though the defendant did not have a key for it. The defendant retrieved the vest and drove off in his car while the Acura was locked remotely. The defendant arrived at the gas station just a few minutes after leaving the Acura and then sold heroin to the UC.

It was a fair inference to conclude that the defendant had retrieved the narcotics from the Acura. It was also fair to infer that his brother had used the remote key to unlock the Acura for his brother and then to relock it after the defendant left. Based upon these facts the police had probable cause to search the Acura.

STOPS AND FRISKS

POLICE APPROACHING DEFENDANT ON BUS NOT A SEIZURE

Commonwealth v. Browning, Appeals Court 20-P-240 (June 14, 2021).

Facts

In September 2018, the Boston police were investigating a series of late-night robberies of women that occurred as the women walked away from the Mattapan Square MBTA station. The police developed a profile of the suspect based upon witness descriptions and surveillance videos recovered from the area. The suspect was a slim, dark-skinned Black male in his early twenties, between five feet, seven inches and five feet, eight inches tall. In most of the videos he was carrying a black North Face backpack. In one video he was wearing Adidas sneakers. The suspect was also caught on camera trying to board a bus near the library after one of the robberies.

On September 10, 2018 officers saturated the area to try to apprehend the suspect. At 11PM police learned that a woman was stabbed and her purse was stolen. Fifteen (15) to twenty (20) minutes later, two (2) detectives were on Blue Hill Avenue and saw an MBTA bus leaving a bus stop. The detectives followed the bus until it pulled over at a different bus stop. As the detectives drove past the bus they noted three (3) passengers: a woman, a man who was taller than the suspect they were looking for, and a Black male with a gray hood pulled over his head that matched the age and complexion of the suspect and appeared to be about the same height and build of the suspect.

The detectives parked a few spots ahead of the stopped bus and entered it. The first detective showed the driver his badge that he had on his waistband and asked the driver how he was doing. The detectives noticed the passenger with the gray hood had a black North Face backpack and brown Adidas sneakers. One of the detectives approached this passenger, later identified as the defendant, and said, "Hey buddy, how are you doing?" The detective immediately recognized the defendant as someone he had dealt with on a prior occasion in his capacity as a crisis negotiator and as the suspect in the surveillance videos. The defendant said hello to the officer and stood up. He was asked if he had any weapons on him. He said he had a knife, which was then recovered by the detectives. The detectives asked him to step off the bus, which he did. The defendant was then escorted across the street to the police station.

The defendant was indicted on multiple charges, including armed robbery, unarmed robbery and assault and battery by means of a dangerous weapon. The defendant argues that the evidence in this case should be suppressed because he was illegally seized when the detectives stopped and entered the bus.

Discussion

The defendant first argues that the officers improperly seized the bus and thus him, without reasonable suspicion. Police did not seize the bus.

A seizure occurs when "an officer has, through words or conduct, objectively communicated that the officer would use his or her police power to coerce that person to stay." *quoting* Commonwealth v Matta, 483 Mass. 357, 362 (2019). "A 'seizure' must arise from the actions of the police officer." Matta at 363. The bus stopped at a bus stop. The detectives did not activate lights or sirens, they did not block the bus in, and they did not stop it from leaving. There was no state action in the stopping of the bus so there was no seizure.

The defendant next argues that he was personally seized by the detectives boarding the bus. For a seizure to take place, the police must "objectively communicate" their intention to use their authority to coerce someone to stay.

The court found that there would not have been any constitutional violation had this encounter occurred on the street. The detectives were not in uniform, they did not draw their weapons or otherwise make a show of authority toward the defendant.

> "The officers spoke briefly to the driver and then to the defendant in a nonconfrontational way. They never announced that they would be conducting a search of the bus or that the passengers were required to remain on the bus."

In addition, the interaction was brief and there was no indication that the bus was delayed in departing the bus stop because of the actions of the officers.

The court recognized that police interactions on buses are unique in that the ability of the suspect to leave are limited. "When officers engage a suspect on a bus, that person may prefer to stay on the bus, rather than leave and avoid the officers, for fear of being stranded on the journey." A suspect on a bus may also feel intimated by the mere presence of police in a confined place where there is nowhere to go. But these facts alone do not make the interaction coercive. If an interaction, such as this one, would have been constitutionally sound if it occurred on the street, the result should not be different just because it occurred on a bus. "The inability to leave the cramped confines of a bus is the 'natural result' of taking a bus, not of police coercion."

The defendant in this case was not stopped in the constitutional sense until he was asked by the detectives to get off the bus. At that point, the detectives had probable cause to arrest him. The detectives knew that a robbery had taken place a short time earlier, the detective recognized the defendant from the surveillance videos, the defendant matched witness descriptions of the suspect of prior incidents, his backpack and sneakers matched those seen in surveillance videos from prior robberies, and the defendant was leaving the area in a bus just like the suspect tried to do after one of the previous robberies.

The motion to suppress was properly denied.

REASONABLE TO INFER THAT JUVENILE WHO AVOIDED POLICE CONTACT, LOOKED OVER HER SHOULDER AND ADJUSTED HER WAISTBAND WAS CARRYING A FIREARM

Commonwealth v. Karen K., 99 Mass.App.Ct. 216 (2021).

Facts

At the beginning of his shift, an officer assigned to the Boston Police Youth Violence Strike Force learned of a report of a group of "kids" hanging around at a local housing complex and displaying a firearm. The officer knew that the police had responded to multiple shots fired there that week, including one the day before. In addition, the officer had personally made multiple firearm arrests there.

The officer responded to that area. Upon his arrival, he noted other officers were on scene and that there was a group of six or seven kids on a pathway of the complex. The officer knew that kids with firearms had been seen on that same pathway in the past. The officer remained in his car which he had positioned on the street so that he had a clear view of the group. As he was seated in his car, he observed the juvenile in this case and another person walking toward the other officers. "It appeared that once the two saw the officers, they 'broke right' into an alley and headed back toward the housing complex." p. 218. The juvenile was seen continuously looking back over her shoulder toward the officers, adjusted her waistband, and blading her body away from officers' view. Based upon the officer's training and experience, specifically training he received from the ATF regarding recognizing the characteristics of an armed gunman, the officer believed the movement of the juvenile was consistent with someone who had an unholstered weapon in their waistband.

The officer approached the juvenile and her companion on foot. Both individuals turned away from these officers, then turned back again when they saw the other group of officers. The juvenile walked quickly back toward the officer and tried to walk around him. The officer grabbed her arm and the juvenile said, "I'm female, you can't search me." Upon being frisked by a female officer, officers found two (2) cell phones and a firearm in her waistband.

Discussion

The stop of the juvenile

> "A police officer is legally permitted to stop someone under art. 14 of the Massachusetts Declaration of Rights if there is reasonable suspicion at the time of the stop that the person has committed, is committing, or is about to commit a crime." p. 220.

It is undisputed that the juvenile was stopped in this case when the officer grabbed the juvenile by the arm. The question is whether the officer was justified in doing so.

At that point in time, the officer knew of the report of a concerned citizen about the group of kids displaying a gun, that shots had been fired at the housing complex in the past, including the day before the call, and that people had used the laundry room at the housing complex to hide guns. The officer also had his observations of the juvenile's actions. Based upon these facts and the officer's training and experience, the court found that the officer had reasonable suspicion to stop the juvenile.

In its analysis, the court noted that the officer was assigned to the Boston Police Youth Violence Strike Force. As a member of the strike force, his duties included taking an active role in the community and the youth, including playing basketball, attending school meetings and otherwise interacting with the youth. The court found that it was reasonable for the officer to infer that the juvenile was under 21 years old. This is important because only people over the age of 21 are eligible for a license to carry a firearm. That means that if there is reasonable suspicion to believe someone under the age of 21 is in possession of a firearm, it is a criminal act because someone that age cannot lawfully possess a firearm.

The patfrisk

> "In order to justify a patfrisk, a police officer needs more than a concern for his safety, he must also have a reasonable suspicion that the defendant is armed and dangerous." p. 221.
>
> "Here, the confluence of the juvenile's movements, the presence of firearm activity at the housing complex the day before and that week, along with [the officer's] specialized knowledge regarding the indicia of someone carrying an unholstered firearm amounted to reasonable suspicion to patfrisk the juvenile." p. 221.

NOTE: This was a close case for the Appeals Court. There was a strongly worded dissent filed in the case.

COMMUNITY CARETAKING - STOP OF INDIVIDUAL

OFFICER'S REQUEST TO SEE DRIVER'S LICENSE AND REGISTRATION WAS WITHIN THE SCOPE OF COMMUNITY CARETAKER FUNCTION AND NOT AN UNLAWFUL SEIZURE

Commonwealth v. Sargsyan, 99 Mass.App.Ct. 114 (2021).

Facts

Newton Police officers were dispatched to a small dead-end street to check on the well-being of the occupant of a car that had been parked with its motor running "for quite some time". It was a cold, dark January night. Upon arrival, officers found the car with the engine running and the defendant, the sole occupant, asleep in the driver's seat.

Officers knocked on the window several times and, after getting no response, knocked harder on the door. After a minute or two, the defendant put his hand up and waved the officer away. The officer knocked again and asked the defendant to lower his window, which he did.

The officer asked for the defendant's license. The defendant's response was slow and he tried to give the officer credit cards instead of his license. The officer noted that the defendant's speech was slurred and slowed and that he seemed very confused. When answering questions, his answers were not appropriate to the question asked. The defendant was asked for the vehicle registration. When he bent toward the glove box to retrieve the registration, the officer saw a knife handle tucked into the defendant's waistband. For officer safety, the defendant was asked to exit the car.

The defendant denied having any weapons on him. For officer safety, he was placed in handcuffs and he was frisked. Officers recovered the knife. When the defendant was exiting the car, the officer saw a syringe on the seat underneath where the defendant had been sitting and a corner baggie of a brown powdery substance in the center console. The defendant was placed under arrest after the officer saw the baggie. Officers later found a small ball of steel wool on the defendant and a glass pipe in the car.

The defendant filed a motion to suppress all the evidence because he believed that the officers' actions exceeded the scope of the community caretaking function.

Discussion

Police are charged with performing community caretaking functions that are separate and apart from the detection and investigation of criminal statutes. When performing these duties, officers are allowed to take reasonable steps that are consistent with the community caretaking purpose of the inquiry, even when those steps would otherwise infringe on a person's constitutional rights.

> "Under the community caretaking function, an officer may, without reasonable suspicion of criminal activity, approach and detain citizens for community caretaking purposes." p. 116.

It is undisputed that the encounter between officers and the defendant began as a community caretaking function of the police; however, it is possible for a community caretaking inquiry to transform into a constitutional seizure. The question is whether it did so here.

The court found that the actions of the officers in this case were appropriate to the community caretaking purpose of that inquiry and did not amount to a seizure of the defendant. The defendant argued that the community caretaking function ended when he waved off the officers, indicating that he was not in need of their assistance. The court disagreed and found that asking the defendant to roll down his window, even after the defendant waved the officer off, was not a seizure.

It is significant that the defendant was in a motor vehicle which poses a potential public safety risk if he drives the vehicle and is not in a condition to do so. The officer in this case did not smell an odor of an alcoholic beverage; however, the court noted,

> "[t]here are conditions other than intoxication due to alcohol or drugs, however, that could have affected the defendant's ability to drive, e.g. medical related conditions. Neither the defendant's apparent sobriety, nor the car's running engine, extinguished the need for the community caretaking inquiry to continue." p. 118.

The court found that each request of the officers in this case was appropriate to the community caretaking function and did not result in the seizure of the defendant. The court also found that the request to view the defendant's license and registration did not amount to a seizure.

> "In the circumstances of this case, we conclude that the officer's requests that the defendant lower the window and show his license and registration fell within the scope of the community caretaking function and did not result in an unlawful seizure." p. 119.

NOTE: The court pointed out in a footnote that there was no testimony that the officer actually took custody or retained the license and returned to his cruiser to check for warrants or to verify the active status of the license. This distinguishes the case from Commonwealth v. Lyles, 453 Mass. 811 (2009) in which the court found that a consensual encounter was transformed to a seizure when the officer took possession of the defendant's identification as opposed to just viewing it to verify the defendant's identity.

COMMUNITY CARETAKING - SEARCH FOR WEAPONS

COMMUNITY CARETAKING DUTIES DO NOT JUSTIFY WARRANTLESS SEARCHES AND SEIZURES IN THE HOME

Caniglia v. Strom, 141 S.Ct. 1596 (2021).

Facts

One evening Edward Caniglia ("Caniglia") had an argument with his wife during which he retrieved a firearm and told his wife to "shoot [him] now and get it over with." His wife declined and left the home, spending the night in a hotel. She called the police the next morning to request a well-being check after she could not reach her husband by phone.

Upon arrival, officers entered the home with the wife. They found Caniglia, who denied being suicidal but otherwise confirmed his wife's account of what happened the night before. Believing that Caniglia still posed a risk to himself or others, the officers called an ambulance. Caniglia agreed to be transported for a psychiatric evaluation but

allegedly only did so after officers promised not to confiscate his firearms. After Caniglia was transported to the hospital, officers entered the home and seized two (2) handguns.

Caniglia sued the officers for violating his Fourth Amendment rights by entering his home and seizing his firearms without a search warrant.

Discussion

It is undisputed that the entry into Caniglia's home and the seizure of the firearms lacked a warrant, lacked consent, and was not in response to a report of a crime. There were also no exigent circumstances that would justify the actions of the officers because any immediate threat had dissipated when Caniglia was removed from the home and no longer had access to the weapons. The only question was whether the officers' actions were justified under the community caretaking function of the police.

In Cady v. Dombrowski, 413 U.S. 433 (1973), the court held that a warrantless search of a car that had been impounded by the police looking for an unsecured firearm did not violate the Fourth Amendment. The question in this case was whether the "caretaking" duties recognized in Cady would justifies warrantless searches and seizures in the home. The US Supreme Court found that it does not. "What is reasonable for vehicles is different from what is reasonable for homes."

MOTOR VEHICLE STOPS

POLICE WERE JUSTIFIED IN EXIT ORDER AND PATFRISK OF OPERATOR OF MOTOR VEHICLE DURING A MOTOR VEHICLE STOP AFTER A HOLSTER WAS OBSERVED NEAR THE DRIVER'S FOOT

Commonwealth v. Monell, 99 Mass.App.Ct. 487 (2021).

Facts

On the evening of May 21, 2019, there was a fatal shooting on Millet Street in Dorchester. Two (2) hours later, Boston Police officers were on routine patrol on Millet Street and saw a car fail to stop for a stop sign and pulled the car over. At the time of the motor vehicle stop, the officers were aware that the shooter from the previous incident was still at large. In addition, the officers considered this a "high crime area" based on previous arrests in the area, many of which involved firearms.

The officers approached the defendant, the sole occupant of the car, asking for his license and registration. The defendant, who was unknown to the officers, was compliant with officers. While on the passenger side of the car, one of the officers illuminated the inside of the car and saw a holster for a firearm lying on the floor, touching the defendant's foot. The officer could not see whether or not the holster was empty. The officer feared for the safety of himself and his fellow officer and alerted his partner. The defendant was ordered out of the car. At that point, the defendant "froze" and acted as if he was trying to

hide his right hand. The defendant was physically removed from the car and pat frisked. No weapon was found.

After the pat frisk, officers saw that the holster was, in fact, empty. An officer then searched the driver's area and found a case under the driver's seat. The case, "felt as if it contained a firearm." The case was seized and a firearm was discovered inside.

The defendant was charged with carrying a firearm without a license, carrying a firearm while loaded without a license, and possession of ammunition without an FID card. The defendant filed a motion to suppress the firearm arguing that the exit order was improper and the firearm was the fruit of the poisonous tree.

Discussion

Exit order

The court began its analysis by determining that the stop itself was valid because the defendant had failed to stop for a stop sign. The court then moved on to the issue of the exit order.

Under Massachusetts case law,

> "an exit order is justified during a traffic stop where
> (1) police are warranted in the belief that the safety of the officers or others is threatened;
> (2) police have reasonable suspicion of criminal activity; or
> (3) police are conducting a search of the vehicle on other grounds."
> (citations omitted) *quoting* Commonwealth v. Torres-Pagan, 484 Mass. 34, 38 (2020) (citations omitted).

This case involves the first scenario. An officer's fear must be based on specific and articulable facts in light of the officer's experience. This is an objective test that is based on the totality of the circumstances.

In this case, there was a motor vehicle stop late at night in an area where officers knew a fatal shooting had occurred two (2) hours earlier and the shooter was still at large. During that motor vehicle stop, an officer saw a holster on the floor by the defendant's foot that the officer reasonably believed might contain a firearm. These facts are enough to cause an objectively reasonable officer to fear for his safety. The court found that, based upon the totality of the circumstances present in this case, the officer's concern for their safety was justified and the exit order was lawful.

NOTE: In a footnote of the decision, the court says,

> "Although there was evidence that the stop occurred in a 'high crime' area, we discount that factor here because the high crime nature of the area did not have a 'direct connection with the specific location and activity being investigated.'"

Commonwealth v Evelyn, 485 mass. 691, 709 (2020), *quoting* Torres-Pagan, 484 Mass. 34, 41 (2020).

Patfrisk

The court reiterated the clarification provided by Torres-Pagan that the "test for a patfrisk is more stringent than for an exit order." A patfrisk is allowed only when an officer has reasonable suspicion that the suspect is armed and dangerous. In this case, when he was asked to exit the car, the defendant "froze" and acted like he was trying to conceal his right hand. The actions of the defendant, together with the presence of the holster, the time of night, and the prior fatal shooting were enough to establish reasonable suspicion that the defendant here was armed and dangerous. The pat frisk was permissible.

Protective sweep of car

Once officers were satisfied that the defendant did not have a weapon on him and confirmed that the holster was empty, officers were justifiably concerned that the weapon might still be in the vehicle. "The Supreme Judicial Court has consistently held that in these circumstances the police are permitted to perform a limited, protective search of the car interior." The court found that the search of the car was limited to looking for a weapon in the area of the driver's seat. The officer found the case under the seat and felt the weight and shape of a firearm. In these circumstances, the seizure of the firearm was justified.

EVIDENCE SEIZED IN A MOTOR VEHICLE STOP THAT WAS UNREASONABLY PROLONGED WILL BE SUPPRESSED

Commonwealth v Soriano-Lara, 99 Mass.App.Ct. 525 (2021).

Facts

At approximately 3PM on September 13, 2016 a State police trooper was on routine patron on Route 1A in Lynn. This trooper had extensive particularized training in narcotics enforcement and had made over 250 arrests for narcotics related offenses, including approximately thirty (30) motor vehicle stops that led to the discovery of hidden compartments and arrests. On that particular day, the trooper pulled a car over after observing it move from a travel lane into a left-turn only lane without signaling.

There were two (2) people in the car, the defendant was the operator. When asked, the defendant provided a Rhode Island license. The passenger told the trooper that her mother was the owner of the car but that the passenger drives it regularly. The registration came back to a party in Foxborough.

The license listed an address in Cranston, Rhode Island. The trooper asked him where he lived and the defendant said, "Providence." The trooper noted that both occupants

appeared nervous in that they were breathing heavily and "their carotid arteries were visibly pulsing in their necks."

The trooper went back to his cruiser and verified that both the license and registration were active and the car had not been reported stolen. The trooper called for backup.

Before backup arrived, the trooper returned to the car, he asked where the defendant was coming from. The defendant said that a friend had repaired his brakes but was unable to give the name of the shop, where it was located or the name of the friend. The trooper believed the defendant was lying so he inspected the tires. He discovered the lug nuts and rims were covered in dust which is inconsistent with having recently had brake work done.

After inspecting the tires, the trooper asked the defendant again where he lived. This time the defendant said, "Cranston." When confronted with the discrepancy between this and his first answer of "Providence" the defendant said that they are the same place. It was at this time that the trooper noticed significant wear on the center console near the temperature controls. He also observed that the carpeting around the center console area had been pulled out of place. The trooper testified that he had previously found a hidden compartment containing drugs in that same location on the same model of Volvo that the defendant was driving.

At this point, the trooper noted that the defendant was becoming agitated. A back-up trooper arrived and they asked the defendant to step out of the car. The defendant complied. He then started yelling to the passenger in Spanish when he got to the back of the car.

At the back of the car, the trooper quizzed the defendant on the names of streets around his house and his age. The trooper had checked the internet for the street information while he was in his cruiser. The defendant said he was 34, but the license said he was 32. The defendant did not respond when asked for his social security number. The defendant was placed in the cruiser. After the passenger was asked out of the car, the trooper pulled on the loose carpeting around the center console and found a hidden compartment containing a metal box. The trooper opened the box and found a bundle of money and cocaine. Both occupants were arrested.

The defendant moved to suppress the cocaine. He argued that the motor vehicle stop was unreasonably prolonged and the evidence must be suppressed as fruit of the poisonous tree.

Discussion

It is well established that a routine traffic stop cannot be extended for an investigatory purpose without reasonable suspicion of criminal activity. The court quoted Commonwealth v. Tavares, 482 Mass. 694, 703 (2019):

> "A valid investigatory stop cannot last longer than reasonably necessary to effectuate the purpose of the stop. The scope of a stop may only extend beyond its initial purpose if the officer is confronted with facts giving rise to a reasonable suspicion that further criminal conduct is afoot. Where an officer conducts an uneventful threshold inquiry giving rise to no further suspicion of criminal activity, he may not prolong the detention or expand the inquiry" (quotations and citations omitted).

In this case, the initial traffic stop was for changing lanes without properly signaling. The trooper approached the car and engaged in a conversation with the occupants of the car. At that time, the trooper was provided with inconsistent information regarding the defendant's address. His license said Cranston, but the defendant originally claimed he lived in Providence. The trooper was justified in going back to his cruiser to verify the information he had received. When he did so, he learned the license and registration were valid and the car was not stolen.

When the trooper approached the car for the second time, he,

> "would have been justified in extending the encounter in order to resolve the apparent discrepancy between the defendant's stated city of residence and the one shown on the proffered license."

However, when an officer has reasonable suspicion that warrants extending a motor vehicle stop, the officer is required to "diligently pursue" whatever means of investigation that is likely to "confirm or dispel" that suspicion quickly.

> "Citizens do not expect that police officers handling a routine traffic violation will engage, in the absence of justification, in stalling tactics, obfuscation, strained conversation, or unjustified exit orders, to prolong the seizure in the hope that, sooner or later, the stop might yield up some evidence of an arrestable crime." *quoting* Commonwealth v Gonsalves, 429 mass. 658, 663 (1999),

In this case, the trooper did not "diligently pursue" questioning designed to clarify the issue of the defendant's identify. "Instead, he proceeded to question the defendant about where the defendant was coming from." The defendant's response then led to more questions and an inspection of the four (4) wheels of the car. That inspection then led to more questioning. It was only at this point that the trooper returned to the issue of the defendant's identify by asking him again where he lived. It was during this questioning that the trooper observed the displaced carpeting near the center console.

The court found that the trooper's "general investigative questioning of the defendant was constitutionally impermissible."

> "[The trooper's] authority to detain the defendant and his passenger ended when the process of ascertaining the defendant's identity and address to the extent required to write him a traffic citation 'reasonably should have been' completed." (quotations and citation omitted.)

Because the initial stop was unreasonably extended without reasonable suspicion of criminal activity, it constituted an illegal seizure. The evidence seized as a result of that seizure should have been suppressed as fruit of the poisonous tree.

NOTE: in a footnote the court stated that the trooper's knowledge of Route 1A as a drug transportation route between Boston and other cities was a factor entitled to little if any weight. This information would not justify extending the length of the stop.

PRETEXT STOP OF MOTOR VEHICLE: INVESTIGATORY PURPOSE

COMMONWEALTH MUST SHOW THAT INVENTORY OF A MOTOR VEHICLE AFTER A PRETEXTUAL STOP WAS NOT TAINTED BY NON-INVESTIGATORY PURPOSE OF THE STOP

Commonwealth v. Lek, 99 Mass.App.Ct. 199 (2021).

Facts

A detective with the Lowell Police Department was working in a plain-clothes capacity patrolling the city looking for motor vehicle violations to pursue gang suppression in the area. The detective first saw the defendant's car stopped behind another car at a stop sign. When the defendant got to the stop sign, he did not come to a complete stop before taking a right turn. The detective followed the car for over five (5) blocks, passing several available parking spaces. The detective testified that he was looking for a safer, better lit area to pull the car over. While following the vehicle, the detective queried the plate and learned that a female, later identified as the girlfriend of the defendant, owned the car.

When the officer pulled the car over, he saw that the driver, the defendant, was wearing clothing that was all red, the color of the Bloods gang. The defendant produced a license; however, the officer reasonably believed that, based upon the photo, it was not the defendant's license. The detective ordered the defendant out of the vehicle, frisked him and told him to sit on the curb. The defendant was not placed into handcuffs and was not told he was under arrest at that time. The detective then began searching the car. The police did not tell the defendant that the car was going to be impounded or that it was going to be searched prior to conducting the inventory. The detective did not ask the defendant if he wanted to contact the owner to pick the car up as an alternative to impoundment. The detective found a firearm in the glovebox. At that point, the defendant was placed in handcuffs.

The defendant filed a motion to suppress the firearm arguing that the inventory of the car was improper.

Discussion

The purpose of an inventory search is to safeguard the car and its contents, to protect the police from charges of misappropriation, or to protect the public from the possibility of dangerous items that may be in the vehicle. Inventory searches of motor vehicles may not be conducted for investigatory purposes.

Because of the non-investigatory purpose of an inventory, the courts have limited police discretion as far as how and when inventories are to be conducted. For example, an inventory must be done pursuant to a written policy that specifically defines the manner and scope of the search. In addition, an inventory may only be conducted when it is reasonably necessary to impound the vehicle.

Before the police can inventory a car, the stop of the vehicle must be constitutional. The Commonwealth conceded in this case that the motor vehicle stop was pretextual and motivated by an investigative purpose. Specifically, the detective was looking to conduct motor vehicle stops to suppress gang activity in the area.

> "The current, well-known rule with respect to traffic stops is that under art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the United States Constitution, they may be undertaken whenever a police officer has either probable cause or reasonable suspicion to believe that a motor vehicle violation was committed, regardless of the officer's subjective reasons for engaging in the stop. This test explicitly permits police to perform pretextual motor vehicle stops, i.e., stops ostensibly made on the basis of a motor vehicle violation, but actually made for the purpose of investigation in order to uncover unrelated criminal activity" p. 203 (citations omitted)

NOTE: if the defendant raises an inference that the pretext for the stop was motivated by racial bias or because of the defendant's membership in some other constitutionally protected class, then the equal protection analysis discussed next in Commonwealth v. Long would apply. No such argument was raised or addressed in this case.

Despite the pretextual nature of the stop, the car in this case was validly stopped because of the failure to stop at a stop sign. However, because the initial stop was pretextual and motivated by an investigatory purpose, the burden is on the Commonwealth to demonstrate that the detective's investigatory purpose did not, in fact, infect the subsequent inventory search.

> "Impoundment must be undertaken for a legitimate noninvestigative purpose, and must be 'reasonably necessary based on the totality of the evidence'" p. 203 *quoting* Commonwealth v. Goncalves Mendez, 484 Mass. 90, 83 (2020).

In this case, the detective had probable cause to arrest the defendant when he provided a false identification. The exit order and pat frisk of the defendant were therefore justified. However, after the defendant was removed from the car, he was not placed under arrest. Instead, he was told to sit on the side of the road and the detective began searching the car.

In prior cases, the Supreme Judicial Court has held that police must allow an arrestee operator's request for an alternative to impoundment of a motor vehicle if such a request is made and it is reasonable and practical. The court here notes that it would be logical to require police to inform operators that they are being arrested and that the car is going to be impounded so that the operator could make such a request before the inventory search takes place; however, no such requirement exists at this point. Best practice would be to inform the operator the car is being impounded.

The court here also considered the Lowell Police Department's written impoundment and inventory policy which allows for impoundment of vehicles in certain enumerated circumstances, including arrest. The policy also provides that,

> "if the owner of a vehicle is arrested, the officer must advise him/her that the vehicle will be taken to a police facility or private storage facility for safekeeping, and that an inventory search of its contents shall be conducted…If the arrested owner asks an officer to dispose of the vehicle in a manner that does not involve police custody, and the request is reasonable, lawful, and can be accomplished within a reasonably short period of time[,] the officer must comply with this request." pp. 201-202.

The court noted that language of the Lowell Police Department's policy requires officers to advise an owner of a car that is being arrested that the car will be brought to a facility for safekeeping. In this case, the driver was not the owner of the car so the officer was not required to tell him that the car was being impounded before the inventory began. The court noted that it would not have been a burden to the police to have advised the defendant as would have been required if he was the owner and that the detective acknowledged on the stand that it was his decision not to give the defendant the opportunity to request an alternative to the impoundment.

Based upon the totality of the circumstances here, the court found that the inventory was tainted by an investigatory purpose.

> "In this case, where the initial traffic stop was a pretext for investigating certain preselected individuals as part of a police operation to suppress gang activity, where the interaction with the defendant confirmed that the defendant was in fact affiliated with a gang, and [the detective] deliberately failed to inform the defendant that he was under arrest or that his vehicle was being impounded prior to searching it, the Commonwealth cannot meet its burden to show that that search -- even if otherwise permissible -- was not tainted with an investigatory purpose." p. 206

The motion to suppress the firearm should have been allowed. The conviction was vacated.

NOTE: the court specifically did not address a policy of the Lowell Police Department that was described by the detective of, "using the tool of pretextual traffic stops for unrelated law enforcement purposes." The court did note, "[w]e echo the concerns, though, of the Supreme Judicial Court in its recent decision in Long, 485 Mass. at 726-730, and note that a policy of unbridled discretion is an obvious invitation to arbitrary action and, particularly when the few things known about a vehicle seen on the street can include the driver's race, it would obviously be a matter of concern were such a policy adopted, at least without strict and explicit criteria for its use." pp. 206-207.

PRETEXT STOP OF MOTOR VEHICLE: RACE-BASED PURPOSE

A TRAFFIC STOP MOTIVATED BY RACE IS UNCONSTITIONAL, EVEN IF THE OFFICER WAS ALSO MOTIVATED BY THE LEGITIMATE PURPOSE OF ENFORCING THE TRAFFIC LAWS

Commonwealth v. Long, 485 Mass. 711 (2020).

Facts

Around 11:00 AM on November 28, 2017, two (2) Boston police officers who were assigned to the Youth Violence Strike Force were in an unmarked cruiser on a side street waiting to make a turn in the Clam Point section of Boston. The officers observed the defendant, a young Black male, driving a Mercedes SUV. The officers turned onto the road directly behind the defendant. The officers did not observe any traffic violation but decided to run the license plate. The query revealed that the vehicle was registered to a Black female, later identified as the defendant's girlfriend, and that there was no current inspection sticker. The officers stopped the vehicle.

The officers requested the defendant's license. The defendant stated he did not have a license but provided the officers with a permit. One of the officers recognized the defendant's name and photograph from the gang unit's database. Further investigation confirmed that the defendant had a suspended license and two default warrants for operating without a license and failure to identify himself. The officers had the vehicle towed, noting that they were aware of thefts and vandalism in the area and the vehicle was a "high end" vehicle that did not belong to the defendant. One of the officers searched the vehicle prior to the tow and recovered a handgun inside of an open bag on the rear passenger seat. The defendant did not have a license to carry and was charged with possession of the firearm.

The defendant filed a motion to suppress and argued that the stop was impermissible because it was the result of selective enforcement of the traffic laws based on race.

Discussion

The equal protection principles of the Fourteenth Amendment to the US Constitution and arts. 1 and 10 of the Massachusetts Declaration of Rights prohibit discriminatory application of the law. The court recognized that some selectivity or discretion must be tolerated in the enforcement of criminal laws; however, that selectivity cannot be based on unjustifiable standards like race, religion or other protected class.

"Of course, a traffic stop motivated by race is unconstitutional, even if the officer also was motivated by the legitimate purpose of enforcing the traffic laws." p. 724. The court recognized the difficulty in identifying cases in which police have targeted a driver based upon the driver's race. The court also found that, when such a violation of equal protection is established, the proper remedy is suppressing evidence and not dismissal of charges.

A defendant seeking to suppress evidence because of alleged violations of equal protection principles, must file a motion to suppress and bears the burden of establishing a reasonable inference that the decision to stop the motor vehicle was motivated by race or some other protected class. The court looked at the issue of equal protection and selective prosecution with respect to motor vehicle stops in Commonwealth v. Lora, 451 Mass. 425 (2008). In Lora, the court found that the defendant could meet this burden by presenting evidence of other motor vehicle stops conducted by the officer. Lora stated that the defendant's evidence "[a]t a minimum, ... must establish that the racial composition of motorists stopped for motor vehicle violations varied significantly from the racial composition of the population of motorists making use of the relevant roadways, and who therefore could have encountered the officer or officers whose actions have been called into question." Lora at 442.

Since the Lora decision, it has become clear that it is difficult to obtain the statistical data contemplated in that decision.

> "Our decision in Lora was intended to make it easier for defendants to establish racial discrimination by allowing them to raise a reasonable inference of racial profiling based on an officer's conduct in other traffic stops." p. 720.

The court took the opportunity presented in this case to readdress the defendant's burden when alleging an equal protection violation in the context of a motor vehicle stop.

The court held that "the evidence necessary to raise a reasonable inference of discrimination need not be statistical." p. 721. While the use of statistical data is one way in which the defendant can meet their burden to establish a reasonable inference that the motor vehicle stop was racially motivated, there are other ways to raise the inference.

> "While defendants still may raise a reasonable inference of racial profiling by demonstrating consistent patterns of racially disparate traffic enforcement by the officer involved, they also may raise a reasonable inference that a stop was racially motivated based on the totality of the circumstances surrounding the particular traffic stop at issue." p. 715.
>
> "The requirement that a defendant establish a reasonable inference that a traffic stop was motivated by racial bias means simply that the defendant must produce evidence upon which a reasonable person could rely to infer that the officer discriminated on the basis of the defendant's race or membership in another protected class." p. 723-724.

If the defendant files a motion that establishes a reasonable inference, based upon the totality of the circumstances, that motor vehicle stop was motivated by race, the defendant is entitled to a hearing on that motion. At that hearing, the Commonwealth bears the burden of rebutting the inference.

The court provided a list of factors judges should consider when examining the totality of the circumstances in these cases. These factors include, but are not limited to:

> (1) patterns in enforcement actions by the particular police officer;
> (2) the regular duties of the officer involved in the stop;
> (3) the sequence of events prior to the stop;
> (4) the manner of the stop;
> (5) the safety interests in enforcing the motor vehicle violation; and
> (6) the specific police department's policies and procedures regarding traffic stops.

The court noted that a legally sufficient, valid reason to stop the vehicle will not be enough to meet the Commonwealth's burden. At the hearing the Commonwealth will have to address all of the reasonable inferences raised by the defense and,

> "would have to prove that the stop was not racially motivated. If the Commonwealth does not rebut the reasonable inference that the stop was motivated at least in part by race, the defendant would have established that the stop violated the equal protection principles of arts. 1 and 10, and therefore was illegal, and any evidence derived from the stop would have to be suppressed." p. 726.

BLOOD DRAWS OPERATING UNDER THE INFLUENCE OF ALCOHOL

BLOOD DRAWS IN OUI INVESTIGATIONS CANNOT BE DONE WITHOUT THE CONSENT OF THE SUSPECT

Commonwealth v. Bohigian, 486 Mass. 209 (2020).

Facts

At around midnight on March 23, 2014, Katrina McCarthy lost control of her SUV as she traveled on an on-ramp to a highway. She crashed into the guardrail and the SUV came to rest in the roadway, blocking approximately two-thirds of the roadway. Ms. McCarthy got out of the SUV and stood beside it on the side of the road. Not long after the original crash, the defendant crashed into the SUV, causing the SUV to spin and hit Ms. McCarthy. Ms. McCarthy was shoved into the defendant's path and was dragged underneath the defendant's car for over 200 ft. Ms. McCarthy suffered serious injuries.

Upon arrival, State police found the defendant and observed an injury to his forehead. Troopers also observed the defendant to be unsteady on his feet, that he had glassy and bloodshot eyes, slurred speech, and a "heavy" smell of alcohol coming from his breath. The defendant was brought to the hospital.

At the hospital, the defendant refused to consent to a blood draw. A trooper applied for and obtained a search warrant to obtain a sample of the defendant's blood. The defendant was presented with the search warrant and continued to object to having his blood drawn. Troopers restrained the defendant's arms and legs while a nurse drew two (2) vials of blood at the direction of the trooper. The blood was analyzed and a chemist determined the blood alcohol level at the time of the crash would have been between .16 and .26.

The defendant was charged and later convicted of negligent operation of a motor vehicle, and OUI causing serious bodily injury. The defendant appealed arguing that the blood alcohol evidence should not have been admitted into evidence.

Discussion

Generally speaking, "[i]t is constitutional to draw a person's blood without consent as long as the law enforcement officer has procured a warrant or exigent circumstances make a warrant impracticable." p. 211.

However, the Massachusetts legislature has passed a statute that specifically addresses the testing of blood alcohol content (BAC) when the testing is done in connection with the prosecution of an OUI. That statute requires the consent of the suspect before blood can be drawn in an OUI investigation.

There are two (2) provisions of the OUI statute, MGL c 90 § 24, that address the testing of BAC. The first is MGL c. 90 § 24(1)(e) which only pertains to prosecutions for OUI,

not aggravated forms of OUI such as OUI causing serious bodily injury. That section states that if the BAC test is done at the direction of a police officer, it is only admissible against the defendant if the defendant consents to the test. If the arrested person does not consent, the test cannot be done.

The other section that applies to the testing of BAC is MGL c 90 § 24 (1)(f)(1), known as the implied consent statute. This part of the statute, "provides that, by driving on public roads, all drivers give consent to submit to a BAC test if arrested for OUI." p. 212. There is also language in that section that infers that this implied consent can be withdrawn. If an arrestee does not consent to a test, no test is to be performed. Unlike 24(1)(e), the implied consent section applies to all OUI offenses.

The court found that, "[b]oth sections require consent for OUI blood draws, and neither make an exception for, or even mentions, warrants." p. 213. The court went on to state that the implied consent section, "flatly and unambiguously prohibits blood draws without consent for the purposes of analyzing BAC, regardless of who directs it." p. 214.

The SJC found that the blood alcohol evidence should have been suppressed. "[H]ere in the Commonwealth, an involuntary blood draw is statutorily prohibited if it is sought for the purposes of an OUI investigation." p. 215. Law enforcement cannot go around the statutory scheme by obtaining a search warrant for the blood.

NOTE: This case involved a defendant who was, by actions and words, clearly objecting to the drawing of his blood; however, the plain language of the statute requires consent and not a failure to object. The issue cannot be avoided by simply not asking for consent and seeking a search warrant. Without consent, the BAC results will not be admissible.

REASONABLE EXPECTATION OF PRIVACY: CELL SITE LOCATION INFORMATION (CSLI)

A REQUEST FOR CSLI BY POLICE IS STATE ACTION

Commonwealth v. Gumkowski, 487 Mass. 314 (2021).

Facts

Between 8:30PM and 9:00PM, on July 10, 2011 the victim's neighbor heard noises from the victim's apartment that sounded like furniture being moved. At 9PM, the smoke alarm alerted and the fire department arrived to find the victim's body at the foot of the bed. A fire had been set on the victim's bed. The victim had been beaten and strangled. The victim also received post-mortem stab wounds.

The State police obtained the victim's cell phone number from a neighbor. The trooper obtained the call logs and other information from the service provider, Sprint. The trooper focused on calls made and received before 9PM that night. The trooper made a second request to Sprint, asking for information for two (2) cell phone numbers. This

request was made under the exigent circumstances provision of the Stored Communication Act, 18 U.S.C. §2702(c)(4).

The trooper received information for one (1) of the requested numbers. The number was registered out of Rhode Island. The records included dates, time and length of calls and cell site location information (CSLI). The phone belonged to the defendant. The CSLI put the phone in the Attleboro area on the night of July 10, 2011.

The investigation also revealed that the defendant had sold drugs to the victim in the past. On the morning of the murder, the defendant had gone to the apartment looking to sell a ring. The victim's neighbor was a former jeweler and looked at the ring, expressing skepticism about the value of it. The neighbor saw the defendant in the victim's apartment at that time.

The defendant's girlfriend testified at trial. She testified that she spoke to the defendant by cell phone around 9:10PM. The defendant's cell phone records show calls occurring between 8PM and 9:15PM and that the phone was in the Attleboro area at those times.

The police focused on the defendant as a suspect after reviewing the cell phone records of the victim and the defendant. Based upon the call log of the defendant's phone, troopers located his girlfriend on July 12, 2011. They were able to locate and arrest him later that day. The victim's blood was on the defendant's shoes and on items in the defendant's backpack.

The defendant gave a statement to the police, admitting to being in the victim's apartment on the evening in question. He said that there were two (2) other people present and that he left after buying drugs.

The defendant filed a motion to suppress the (CSLI) and fruits of the poisonous tree, specifically the items with the victim's blood on them that were recovered when the defendant was arrested.

Discussion

As part of the investigation, officers obtained cell phone records, including subscriber information, call logs and CSLI. Only the CSLI information was at issue in the case.

> "Individuals have a reasonable expectation of privacy in their CSLI, and thus the government needs a warrant before searching more than six hours of CSLI data."

In this case, the troopers requested CSLI for a period of twenty-four (24) hours.

The Commonwealth argued that the information did not need to be suppressed because there was no state action. The freedom from unreasonable searches and seizures protected by art. 14 of the Massachusetts Declaration of Right and the Fourth Amendment to the United States Constitution only apply to actions of the state. If there is no state action, evidence will not be suppressed. The Commonwealth's argument here

was that the CSLI was turned over under a voluntary provision of the Stored Communications Act and not a mandatory provision. As such, there was no state action. The court was not persuaded by the Commonwealth's argument because the police requested the information from Sprint. The court found that it did not matter whether the request was made under a mandatory provision or a voluntary provision of the Stored Communications Act. "In either instance, if law enforcement instigates the search by contacting the cell phone company to request information, there is State action."

The court found that the troopers violated the defendant's reasonable expectation of privacy when they obtained his CSLI without a warrant and that the evidence should have been suppressed.

REASONABLE EXPECTATION OF PRIVACY - CURTILAGE

HALLWAY OF MULTI-UNIT BUILDING NOT CURTILAGE OF AN APARTMENT

Commonwealth v. Sorenson, 98 Mass.App.Ct. 789 (2020).

Facts

An eyewitness identified the defendant as an assailant in a stabbing. The witness provided police with the defendant's street address and said that he lived on the third floor in an apartment in the back, on the right-hand side of the building. A Lowell Police Sergeant went to the three-story building and found that it had multiple apartments on each floor. The sergeant knocked on an apartment door. When a woman answered door, the sergeant asked for the defendant. The defendant came walking toward the door and was asked to "step out in the hallway." The defendant stepped out into the hallway and was arrested and ultimately convicted of armed assault with intent to rob and assault and battery by means of a dangerous weapon causing bodily injury.

The defendant agrees that there was probable cause to arrest him; however, he argues that statements he made to officers and the officer's observations of him at the time of the arrest should be suppressed because the warrantless arrest itself was improper because it occurred in the curtilage of his apartment.

Discussion

It is well settled that people have a reasonable expectation of privacy in their homes and the curtilage of the home. An area outside the home will be considered curtilage if the court finds that "the area harbors the 'intimate activity associated with the sanctity of a [person's] home and the privacies of life.'" p. 792 quoting *United States v Dunn*, 480 U.S. 294, 300 (1987).

What is considered curtilage is a fact-specific inquiry but, in the case of multi-unit buildings, it is narrowly applied. The *Dunn* court set forth four (4) factors the court should consider:

1. Proximity of the area claimed to be curtilage to the home;
2. Whether the area is included within an enclosure surrounding the home;
3. The nature of the uses to which the area is put; and
4. The steps taken by the resident to protect area from observation by people passing by. *Dunn* at 301.

The court noted that these four (4) factors are not an exhaustive list, but are useful tools when determining whether the area is so "intimately tied" to the home that it deserves the home's protections against unreasonable searches and seizures.

The court found that the only factor present in this case was the first one because the hallway was adjacent to the apartment. The record does not support a finding in the defendant's favor as to the other three (3) factors.

The hallway was not within the curtilage of the apartment. The warrantless arrest of the defendant in the hallway was valid.

REASONABLE EXPECTATION OF PRIVACY - SENT TEXT MESSAGES

INDIVIDUALS DO NOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN TEXTS THEY SEND TO OTHERS

Commonwealth v. Delgado-Rivera, 487 Mass. 551 (2021).

Facts

On September 18, 2016 an officer in Texas pulled over a motor vehicle for a traffic violation. Leonel Garcia-Castaneda was the sole occupant of the car. During that stop, officers searched the car and the cell phones of Garcia-Castenada. During the search of the cell phones, officers discovered text messages sent from a Massachusetts area code discussing the shipment of narcotics and how payments would be made. The Texas authorities sent this information to law enforcement in Massachusetts who linked the telephone number to the defendant. An investigation was launched culminating in the indictment of the defendant, Garcia-Castenada and five (5) others on drug trafficking and conspiracy charges.

Garcia-Castaneda moved to suppress all evidence seized as a result of the traffic stop in Texas. The defendant moved to join that motion arguing that he had a privacy interest in the text messages he sent to his co-defendant.

Discussion

To succeed on his motion the defendant must establish that he had a reasonable expectation of privacy in the text messages he sent to the co-defendant. Whether an expectation of privacy is objectively reasonable depends upon the facts and circumstances of each case. Relevant factors to consider include: the character of the item being searched, the defendant's possessory interest in it, if any, and any precautions the defendant took to protect that privacy interest.

The court found that the lack of control that the defendant had over the text messages once they were sent was determinative of the issue finding that, once something is out of the author's control, they do not have a reasonable expectation of privacy in the content. The court drew a similarity between text messages and traditional letters one sends in the mail. In cases dealing with issue of the privacy of letters, the court has found that, once "one party relinquishes control of a letter by sending it to a third party, the reasonableness of the privacy expectation is undermined." *quoting* United Stated v Knoll 16 F.3d 1313, 1321 (2d. Cir. 1994). This logic has also led the court to the same result when considering email messages.

> "This reasoning is similarly applicable to the messages at issue in this case, which created a record of the communication that was readily and lastingly available to, and easily understood by, and almost instantaneously disbursable by the intended recipient, as well as unintended readers, all beyond the control of the sender."

Delgado-Rivera had no objectively reasonable expectation of privacy in the text messages he sent. Because he lacked any reasonable expectation of privacy in the texts, he cannot challenge the search of the co-defendant's phone.

NOTE: The court indicated in a footnote that there was no claim that the defendant here used any encryption devise or application when he sent the texts in this case. Because it was not an issue in this case, the court did not elaborate on it beyond saying that it would have been a factor to consider when looking at the actions an individual took to protect their privacy interests.

REASONABLE EXPECTATION OF PRIVACY – COMMON BASEMENT OF MULTI-UNIT BUILDING

TENANTS OF MULTI-UNIT BUILDING HAVE NO REASONABLE EXPECTATION OF PRIVACY IN COMMON BASEMENT OPENLY ACCESSIBLE TO ALL

Commonwealth v. DeJesus, 99 Mass.App.Ct. 275 (2021).

Facts

During the summer of 2018 there was a series of shootings in Fall River. As a result of this violence, the police organized a task force which included Detective Mendez who was also a member of the department's gang unit. As part of his duties, Detective Mendez monitored social media accounts of various people believed to be involved in the violence within the city. On July 26, 2018, the detective was monitoring the Snapchat account of Darius Hunt, a known gang member. The detective observed numerous videos taken within the past 24 hours which depicted Hunt and the defendant. In several of those videos the defendant was seen "holding a black semi-automatic pistol with an extended magazine and a distinct tan/cream colored grip." The videos also showed a

basement area and the outside of a 3-family house on Downing Street in Fall River. The defendant did not live at that address nor was he an overnight guest.

Officers went to the address and found several people standing out front, including the defendant and Hunt. As officers approached, the people dispersed. The defendant walked down the street toward his girlfriend's house while others, including Hunt, ran to the back of the building. Detective Mendez chased Hunt. In the backyard, Detective Mendez found the yard empty but saw the rear door of the basement was open. He could hear people running in the basement.

Officers followed the sound of the footsteps and entered the basement through the open door. The basement, a common area used by residents of the apartments, had no locks on the doors leading to it. Officers saw a gun in plain sight in an open bag that was on a table. This gun appeared to be the same one as in the videos. Police froze the scene, obtained a search warrant, and seized the gun.

The defendant was charged with unlawful possession of a firearm without a license, MGL c 269 § 10(a); unlawful possession of a large capacity feeding device, MGL c. 269 § 10(m); and unlawful possession of ammunition, MGL c 269 § 10(h). The defendant filed a motion to suppress the evidence seized.

Discussion

A defendant must establish that they have standing to contest the constitutionality of a search and a reasonable expectation of privacy in the place to be searched. Automatic standing applies when possession of an item at the time of the search is an essential element of the crime. Under art. 14 of the Massachusetts Declaration of Rights, a defendant with automatic standing does not need to show that they personally had a reasonable expectation of privacy in the area to be searched, instead, they just need to show that someone had a reasonable expectation of privacy in the place to be searched.

Automatic standing

The defendant does not have automatic standing in this case because it was undisputed that the defendant was not in possession of the firearm at the time of the search. The defendant was charged with possessing the firearm at the time the videos were created. For these reasons, the defendant did not have automatic standing to contest the search.

Reasonable expectation of privacy

Even if the defendant had automatic standing, he would still need to show that he or someone else had a reasonable expectation of privacy in the basement. The defendant himself had no such reasonable expectation of privacy because he did not live in the building or in any way establish that he somehow controlled the searched area.

The defendant also failed to establish that anyone had a reasonable expectation of privacy in the area to be searched. Tenants of a multi-unit home do not have a reasonable expectation of privacy in common areas. Further, landlords do not have a reasonable expectation of privacy in areas that are openly accessible to their tenants.

In this case, the defendant cannot show that anyone had a reasonable expectation of privacy in the basement area of that building. The doors leading to the basement did not have locks, the area was readily available for use by any of the tenants, their invitees, and the landlord, and no one exerted exclusive control over the area.

The motion to suppress was properly denied.

REASONABLE EXPECTATION OF PRIVACY: INTENSIVE CARE UNIT OF HOSPITAL

PATIENT IN INTENSIVE CARE UNIT OF HOSPITAL HAS NO REASONABLE EXPECTATION OF PRIVACY IN THAT ROOM

Commonwealth v. Welch, 487 Mass. 425 (2021).

Facts

The defendant and the victim began dating in the fall of 2011. Around midnight on February 20, 2012 the victim called 911 screaming that her boyfriend was trying to kill her. Police forced their way into the apartment where they found the victim dead on the bathroom floor with her throat cut. The defendant was found alive, lying nearby on the bedroom floor with his throat cut.

The defendant was transported to the hospital where he required surgery for the injury to his throat. He was then brought to the intensive care unit (ICU) where he stayed for several days. During his time at the ICU, he was guarded by police officers who positioned themselves either in the room or in the hallway outside the open door to his room. Due to his injuries, the defendant was unable to speak and communicated by writing notes. Medical staff gave some of these notes to the officers. At some point police secured the notes that had been placed on a table in the hallway outside the defendant's ICU room.

On February 21, Trooper Riley, the lead investigator, went to the hospital when he learned that the defendant was going to be given another cognitive test. The defendant passed the cognitive test and was then interviewed by Trooper Riley. During the interview, the defendant communicated with Trooper Riley by writing notes. The interview continued for an hour under the defendant wrote, "At this point I would like to see a lawyer. You k[n]ow w[h]ere to look now." p. 431.

Trooper Riley returned the next day and arrested the defendant in his hospital room. Trooper Riley told the defendant that he would be seizing the notepad and would apply for a search warrant for it. "The defendant replied by writing, '[A]m I somehow waiving my right to an attorney by doing this?' He added, '[A]t this point I do reserve my right to remain silent, and the right to any private conversations with medical providers." p. 431-432.

Defendant argues that handwritten notes he made while he was hospitalized should have been suppressed because they were obtained by an unconstitutional search and seizure.

Discussion

The defendant argued that his rights guaranteed by the 4th Amendment and art. 14 of the Massachusetts Declaration of Rights were violated when officers took the handwritten notes that the defendant gave to hospital staff and officers while he was in the ICU. The court found there was no search.

> "The Fourth Amendment and art. 14 protect individuals from unreasonable searches and seizures. For these constitutional protections to apply, however, the Commonwealth's conduct must constitute a search in the constitutional sense." *quoting* Commonwealth v. Almonor, 482 Mass. 35, 40 (2019). A search occurs when police intrude upon a "constitutionally protected reasonable expectation of privacy." *quoting* Commonwealth v Porter P., 456 Mass. 254, 259 (2010), *quoting* Commonwealth v Montanez, 410 Mass. 290, 301 (1991). p. 432.

A defendant has a constitutionally protected reasonable expectation of privacy if two (2) things are established:

(1) the defendant has manifested a subjective expectation of privacy in the item being searched; and
(2) society recognizes that expectation of privacy as reasonable.

The defendant must establish both.

The court found that the defendant had no subjective expectation of privacy in his ICU room. The door to the room was open throughout his stay and hospital staff and officers entered the room at various times. The court also found it significant that the defendant never asked any of the officers to leave. In fact, he invited an officer into the room on at least one occasion to ask if he was going to be evicted from his apartment.

The court also found that there was no objectively reasonable expectation of privacy in his room at the ICU. When determining whether an expectation of privacy is reasonable, the court considers several factors, including:

(1) the nature of the place searched,
(2) whether the defendant owned the place searched,
(3) whether the defendant controlled access to the place searched,
(4) whether the defendant owned the item seized or inspected, and
(5) whether the defendant took precautions to protect their privacy.

The court found that patients in the ICU have greatly diminished privacy interests while they are there as many people, including medical staff, hospital personnel, other patients, and family members move frequently throughout the area.

Analyzing the facts of this case reach a similar result. Numerous officers and hospital personnel entered the defendant's ICU room freely and unhindered throughout his stay. Based upon the facts of this case, the court found, "even if the defendant had manifested an expectation of privacy in his ICU room, it would not have been reasonable." p. 434.

The court further found that the defendant had no reasonable expectation of privacy in the handwritten notes themselves. During his stay, the defendant voluntarily passed notes to communicate with the officers and hospital staff on multiple occasions. Some of those notes were left for periods of time on a table outside his room. The first time the defendant even attempted to maintain any privacy interest in the notes was the day he was arrested. Based upon the facts of this case, the defendant failed to manifest an expectation of privacy in those notes.

NOTE: In a footnote the court dismissed an argument made by the defendant that the notes and statements that the defendant gave to medical personnel that were later turned over to the police should have been suppressed because of a violation of the Federal Health Insurance Portability and Accountability Act (HIPPA) and the Massachusetts Patient's Bill of Rights, MGL c 111 sec 70E. Violations of these statutes do not result in a suppression remedy.

FRUIT OF THE POISONOUS TREE - INDEPENDENT SOURCE DOCTRINE

WHEN OFFICERS OBTAIN A SEARCH WARRANT AFTER AN INITIAL CONSTITUTIONAL VIOLATION, THE EVIDENCE WILL NOT BE SUPPRESSED IF THERE IS AN INDEPENDENT SOURCE OF THE INFORMATION THAT LED TO THE ISSUANCE OF THE SEARCH WARRANT

Commonwealth v. Pearson, 486 Mass. 809 (2021).

Facts

"In early 2012 there was a rash of residential burglaries in Brookline and Cambridge resulting in the theft of jewelry, credit cards, electronics and other items." p. 810. The investigation led police to the defendant and his wife. Officers applied for warrants for their arrest. Before the warrants issued, the police went to their home in Lynn. The wife answered the door and officers told her they had a warrant for her arrest and took her into custody. At the time of her arrest, the arrest warrants had not yet issued. The court noted in a footnote that it was unclear whether officers knew that the warrants had not issued. The wife directed officers to a bedroom where officers saw some of the stolen items. Officers located the defendant in a different bedroom and placed him under arrest.

After booking, both the defendant and his wife agreed to be interviewed. During her interview, the wife made various inculpatory statements. The Brookline police applied for and obtained a search warrant for the home in Lynn. The affidavit stated that police made the decision to seek a warrant after the wife indicated to them that she could not

consent to a search of the house because it belonged to her stepfather. The affidavit also included references to evidence police observed when they initially entered the home to make the arrests. Those items were found and seized during the execution of the search warrant.

The defendant and his wife were indicted on multiple charges in Norfolk and Middlesex counties. The wife ultimately testified against her husband pursuant to a cooperation agreement with the Commonwealth.

The defendant filed a motion to suppress the items seized pursuant to the search warrant. The defendant argued that the items observed during the initial entry into the home was an unlawful search because officers were not in possession of arrest warrant when they entered the home to arrest him.

Discussion:
"[T]he exclusionary rule bars the use of evidence derived from an unconstitutional search or seizure." p. 812 *quoting* Commonwealth v. Fredericq, 482 Mass. 70, 78 (2019) *citing* Wong Sun v. United States, 371 U.S. 471, 487-488 (1963). There are exceptions to the exclusionary rule, including the independent source doctrine.

> "The purpose of the 'independent source' doctrine, recognized under both the Fourth Amendment to the United States Constitution and art. 14 of the Massachusetts Declaration of Rights, has been described by the United States Supreme Court in this way: '[T]he interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. . . . When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation.'" p. 813 *quoting* Murray v. United States, 487 U.S. 533, 537 (1988) *quoting* Nix v. Williams, 467 U.S. 431, 443 (1984)."

In order for the independent source doctrine to apply to items seized pursuant to a search warrant that was issued after an initial constitutional violation, the Commonwealth must make two showings:

(1) The officers' decision to seek a search warrant was not prompted by what they observed during the initial illegal entry, and
(2) the affidavit supporting the search warrant application contained sufficient information to establish probable cause, "apart from" any observations made during the earlier illegal entry.

The Commonwealth must satisfy both of these prongs by a preponderance of the evidence in order for the independent source doctrine to apply.

The first prong is a subjective inquiry: were the officers in this particular case prompted to seek a search warrant by what they saw during the initial illegal entry. The court does not have to accept an officer's statement on the issue at face value.

> "[I]n order to determine whether law enforcement officers would have sought a search warrant regardless of the initial illegal entry and search, a court objectively must assess the 'totality of the attendant circumstances' to ascertain whether the officer's stated reasons for seeking the warrant are 'implausible.'" p. 815.

In this case, the detective specifically stated in the affidavit that the decision to seek a warrant was made after the unlawful entry. However, the record here is inconclusive as to whether the police would have sought a search warrant if the initial entry had not occurred.

The second prong is an objective inquiry: whether the affidavit, when the information regarding the illegal search are redacted from it,

> "provides, 'sufficient information for an issuing magistrate to determine that the items sought are related to the criminal activity under investigation, and that the items reasonably may be expected to be located in the place to be searched' when the search warrant was issued." p 816 *quoting* Commonwealth v. DeJesus, 439 Mass. 616, 626 (2003).

In this case, the second prong was satisfied; however, because the first prong could not be decided on the record before the court, the case was remanded for an evidentiary hearing as to that prong.

FIFTH AMENDMENT

OVERVIEW OF THE FIFTH AMENDMENT

There are two (2) separate inquiries the court makes when deciding whether the statement of a defendant can be introduced into evidence.

1. Was there a violation of the defendant's Miranda rights?
2. Was the statement voluntary?

Only statements that are voluntary and do not violate Miranda will be admissible.

Miranda rights

Miranda rights only apply to suspects who are in custody and subject to interrogation.

Custody

Custody does not just mean someone who is under arrest. A person is in custody if a reasonable person facing the same facts and circumstances would believe that they were in custody and not free to leave. Commonwealth v. Buckley, 410 Mass. 209 (1991).

Interrogation

Interrogation is any words or actions of the police which the officer knows or should know are reasonably likely to elicit an incriminating response. Rhode Island v. Innis, 446 U.S. 291 (1980).

For suspects that are in custody and subject to interrogation, they must be given their Miranda rights and they must make a knowing, intelligent and voluntary waiver of those rights before they speak. Statements given without a proper waiver of Miranda rights will be suppressed.

Miranda warnings

There are four (4) required Miranda warnings. The omission of any of these warnings means that the warnings were defective and any statements made will be suppressed.

(1) You have the right to remain silent.
(2) Anything you say can and will be used against you in a court of law.
(3) You have the right to an attorney.
(4) If you cannot afford an attorney, one will be appointed for you.

The best practice is also to advise the suspect: If you do decide to answer questions, you still have the right to stop answering at any time.

Voluntariness

Statements must be made freely and voluntary before they can be used against someone. The court looks to the totality of the circumstances when determining whether a statement is voluntary.

CUSTODY AND VOLUNTARINESS

DEFENDANT'S NOT IN CUSTODY AS A PATIENT IN THE ICU

Commonwealth v. Welch, 487 Mass. 425 (2021).

NOTE: This is the same case we discussed in the search and seizure section where the defendant was a patient in the ICU. The facts summarized below contain information relevant to the 5th Amendment issues raised in the case.

Facts

The defendant and the victim began dating in the fall of 2011. Around midnight on February 20, 2012 the victim called 911 screaming that her boyfriend was trying to kill

her. Police forced their way into the apartment where they found the victim dead on the bathroom floor with her throat cut. The defendant was lying nearby on the bedroom floor with his throat cut.

The defendant was transported to the hospital where he required surgery for the injury to his throat. He was then brought to the intensive care unit (ICU) where he stayed for several days. During his time at the ICU, he was guarded by police officers who positioned themselves either in the room or in the hallway outside the open door to his room. Due to his injuries, the defendant was unable to speak and communicated by writing notes. Medical staff gave some of these notes to the officers. At some point police secured the notes written by the defendant that had been placed on a table in the hallway outside the defendant's ICU room.

On at least one occasion, the defendant specifically requested the trooper come into the room. The defendant asked the trooper whether he would be evicted from his apartment because he was behind in his rent.

On February 21, Trooper Riley, the lead investigator, went to the hospital to speak to the defendant. Trooper Riley explained who he was and suggested the defendant might have helpful information. The defendant nodded his head. Trooper Riley asked him if he was not yet ready to speak because of his injury. When the defendant nodded in response, Trooper Riley left the room.

At 4PM that day the defendant was introduced to another trooper and was told that he should let that trooper know if he wanted to talk. The defendant wrote a note saying, "one more day in ICU before I can talk." p. 430. Trooper Riley returned two (2) hours later when he learned that the hospital would be giving the defendant another cognitive test. The defendant passed the cognitive test and was then interviewed by Trooper Riley.

As Trooper Riley was explaining the purpose of the interview, the defendant wrote notes saying that he "was at her house, 'she was in the bathroom,' 'Hygiene/makeup.'" The defendant was told to stop and to listen. Trooper Riley told the defendant he was not under arrest and then gave him an incomplete Miranda Warnings – he failed to tell the defendant an attorney would be appointed to him if he could not afford one. The defendant nodded when asked if he was familiar with Miranda warnings. Trooper Riley explained to the defendant that everything he wrote was going to be part of the record. The interview continued for an hour until the defendant wrote, "At this point I would like to see a lawyer. You k[n]ow w[h]ere to look now." p. 431.

Trooper Riley returned the next day and arrested the defendant in his hospital room. Trooper Riley told the defendant that he would be seizing the notepad and would apply for a search warrant for it. "The defendant replied by writing, '[A]m I somehow waiving my right to an attorney by doing this?' He added, '[A]t this point I do reserve my right to remain silent, and the right to any private conversations with medical providers."

Defendant argues that handwritten notes he made while he was hospitalized should have been suppressed because they were obtained in violation of his Miranda rights and were not voluntary. As we previously discussed, the court found there was no search in the constitutional sense because the defendant had no expectation of privacy in the ICU.

Discussion

Miranda rights

The defendant argues that the statements he made while in the ICU should be suppressed because officers "did not scrupulously honor his invocation of his right to silence."

> "Before determining whether the defendant invoked his right to silence, however, we must examine whether he was in custody at the time and thus whether Miranda warnings were necessary." p. 435.

To determine whether someone is in custody, the court asks whether a reasonable person in the position of the defendant would find the environment in which the interrogation took place coercive.

There are typically four (4) factors that the court considers; however, these factors are nonexclusive and none of them are dispositive.

1. The location of the interrogation;
2. Whether the police conveyed to the defendant the belief or opinion that the defendant is a suspect;
3. The nature of the interrogation i.e. was it aggressive, informal, "influenced in its contours" by the defendant;
4. Whether the person was free to end the interview either by leaving or asking the interrogator to leave. Did the conversation end in the arrest of the defendant?

The court found that the defendant was not in custody in this case. "A reasonable person in the defendant's position would not have experienced the environment at issue as coercive." p. 436. The court evaluated the four (4) factors as follows:

1. The location was an ICU room in a hospital, not in an interrogation room at the police station. In addition, medical personnel walked freely in and out of the room through an open door which indicated that officers could not "dominate the setting."
2. It was the defendant who indicated to police that he thought he was a suspect. The troopers made no indication in that regard to him.
3. The nature of the questioning was not aggressive. The court found to the contrary, noting that at each interview troopers asked if the defendant wanted to speak to them and it was the defendant who initiated most of the conversations with the troopers.
4. The fact that the defendant was in a hospital, connected to machines and intravenous lines did not render the environment coercive.

> "It is true that the defendant's medical condition ensured that he could not leave the room at will. At the same time, the defendant, not law enforcement, created the situation in which he found himself." p. 437.

There was no evidence that the troopers exploited the situation by extending the defendant's stay in the hospital unnecessary. The court found that a reasonable person in the defendant's position would understand that they were being held in the hospital for medical reasons and not at the behest of law enforcement for investigative reasons.

> "More importantly, officers expressly told the defendant that he could ask them to leave at any time. This is analogous to cases dealing with the Miranda rights of prisoners; the defendant's ability to leave the room was obviously constrained, but his ability to change who was in it was not." p. 437.

The court noted that the analysis would have been different if the defendant had asked the troopers to leave. Because he did not do so, there was no error.

The court went on to clarify that, even if he was in custody, "the defendant's statement – a written note stating 'one more day in ICU before I can talk' did not properly invoke his right to remain silent on February 21." p. 438. An invocation of the right to remain silent must be "unambiguously" stated such that, objectively, "a reasonable officer in the circumstances would understand the statement to be an invocation of the Miranda rights." p. 438. A statement that he was willing to speak to the troopers at some future time is not sufficient to invoke his Miranda rights.

<u>Voluntariness of statements</u>

Only voluntary statements of a defendant can be admitted into evidence. This is a separate inquiry from Miranda and it applies to statements made to law enforcement and civilians. If the statement is not voluntary, it will not be admitted into evidence.

The court looks at four (4) factors when considering voluntariness:

1. The conduct of the defendant;
2. The defendant's age, education, intelligence and emotional stability;
3. The mental and physical condition of the defendant; and
4. The details of the interrogation, including whether Miranda warnings were given.

Statements of defendants who are under the influence of drugs or alcohol, in serious pain or suffering from serious injuries are not automatically deemed involuntary. Court have found statements of people in a disturbed emotional state including those who are suicidal can be found to be voluntary. The court looks to the totality of the circumstances.

In this case it was clear that the defendant suffered a serious injury requiring hospitalization in the ICU. The court also found that the defendant was responsive to

questions by medical staff and the troopers, was awake, alert and passed the cognitive tests administered by the hospital staff. The defendant was able to manipulate his surroundings to improve his comfort level and was able to communicate via notes. Not only was he aware of his immediate surroundings, but he also asked about the victim's medical condition and raised concerns over being evicted. "The defendant even had the presence of mind to provide exculpatory statements, such as claiming that the victim's wounds were self-inflicted." p. 440.

The officer's questioning of the defendant was neither psychologically nor physically coercive. There were no improper promises or inducements made to him and officers repeatedly told him that he could ask the officers to leave. The statements were voluntary.

WAIVER OF MIRANDA AND VOLUNTARINESS OF STATEMENT

LOW INTELLIGENCE AND ALLEGED INTOXICATION DID NOT RENDER WAIVER OF MIRANDA RIGHTS INVALID

Commonwealth v. Williams, 486 Mass. 646 (2021).

Facts

In early July 2013, the defendant and others, including his cousin Eugene Tate, went to Mario Fiume's home to purchase marijuana. Joseph Puopolo was at Mr. Fiume's house when the group arrived. At one point, Mr. Fiume told the defendant to either pay for the marijuana or leave. It was at that time that the defendant and his cousin brandished guns and the defendant demanded the drugs and the money. The defendant shot Mr. Fiume and his cousin shot Puopolo. Mr. Puopolo died from his injuries.

The defendant was arrested later that week in East Boston. He was transported to the Stoneham police station where he was interviewed.

> "Before the start of the interview, police read the defendant a Miranda form and video recording consent form. After the defendant agreed to the videorecorded interview, police again advised him of his Miranda rights, this time on video, and the defendant signed and initialed the Miranda form, indicating that he understood. The defendant agreed to speak with police." p. 648.

During the interview, he admitted that he and Tate had planned to steal the drugs but that things "did not go as intended." He also admitted to shooting Fiume.

The defendant was convicted of murder in the first degree on a theory of felony murder and assault and battery with a dangerous s weapon causing serious bodily injury. The defendant appeals on several issues, one of which was the denial of the motion to suppress his statements. The defendant argued that the Commonwealth had failed to

prove that he voluntarily waived his Miranda rights and that he voluntarily made the statement.

Discussion

The voluntariness of a Miranda waiver is a separate and distinct issue from the voluntariness of a particular statement. The Commonwealth must prove both for a statement to be admissible.

A waiver of Miranda rights must be voluntary, knowing, and intelligent. The court will look at the totality of the circumstances and will consider several factors, including but not limited to the age, education, intelligence, physical and mental condition of the suspect, whether the suspect has had any prior experience with the criminal justice system, whether any promises were made, and the recitation of the Miranda warnings to the suspect.

A statement is voluntary if it is 'the product of a rational intellect' and 'free will,' rather than one induced by physical or psychological coercion." p. 659 (citations omitted).

The defendant raised three (3) issues with respect to his statements:

(1) His diminished mental capacity due to low intelligence and intoxication rendered his Miranda waiver invalid.
(2) Promises of leniency rendered his statements involuntary.
(3) He invoked his right to counsel.

Diminished mental capacity and Miranda waiver

The defendant first argues that his diminished mental capacity should have been given special attention. The defendant suggests that his low intelligence and his intoxication at the time of the interrogation rendered his Miranda waiver and subsequent statement invalid.

The court noted that people with low intelligence can waive their rights. In this case, the defendant was advised of his Miranda rights when he was arrested, again when he was brought to the State police barracks, again when he was booked at the Stoneham police station, then again before the interview, and again when police began recording the interview and one more time during the interview. Despite proof that the defendant suffered from a language-based learning disability and had dropped out of high school, the court found that the defendant had no difficulty understanding the police and responded appropriately during the interview. In addition, the defendant was calm and cooperative during the interview.

The defendant also argued that his mental capacity was diminished because he was under the influence of marijuana and alcohol at the time of the interview. At the motion hearing, the trooper testified that the defendant did not exhibit any indicia of intoxication at the time of the interview.

> "Based on the evidence presented at the hearing on the motion to suppress and our independent review of the recorded interview, the motion judge properly concluded, beyond a reasonable doubt, that the defendant made his statements voluntarily after a knowing and intelligent waiver of his Miranda rights." p. 661

Promises

The second issue raised by the defendant was that there was a promise made to him that rendered his statements involuntary. The court found that there were no promises made to the defendant in this case. The police,

> "stated, 'We'd like to help you and just wrap this up and get your side of it honestly.' They also stated: 'I think it would really help you out.' They encouraged the defendant to 'help [himself] out' by telling the truth. Police did not, however, assure the defendant in any way that his confession would aid in his defense; in fact, they explicitly informed him that it would not…They told him, '[W]e said that we're trying to have you tell us the truth because we want to know the truth. We're not here making you any promises or making you any or saying that if you help us or tell us anything, we can offer you anything because that is not the case.' Statements encouraging the defendant to be truthful without a direct or implicit promise of leniency, such as the ones at issue here, are not improper." p. 661.

Invocation of right to counsel

The third issue raised by the defendant was that he invoked his right to counsel. If an accused indicates during a custodial interrogation that they wish to remain silent, the interrogation must cease. Similarly, if an accused requests an attorney during a custodial interrogation, the interrogation must stop until an attorney is present. The request for counsel must be unambiguous.

The court found that, in this case, the defendant did not unambiguously request an attorney.

> "The defendant stated, '[T]his is where the lawyer thing come in.' The trooper responded, 'If you're saying the lawyer thing, does that mean you want to have a lawyer? Do you want to stop?' To which the defendant responded, 'No, I definitely, I'll definitely, like I'll talk.'" p. 662.

This statement is too ambiguous to be considered an unequivocal invocation of the defendant's right to counsel. The court noted that the trooper was not required to clarify the statement but did so.

> "The trooper further stated, '[I]t's very important if you said something about an attorney, if you're saying you want a lawyer, I want to stop, but if you want to talk I'm glad to listen. Do you understand what I'm saying?' In response, the defendant stated, 'Mm-hmm,' and affirmatively nodded his head up and down. Both the testimony at the motion hearing and the recorded interview reflect the defendant's desire to go forward with questioning without an attorney." p. 662.

The motion to suppress was properly denied.

INVOCATION OF RIGHT TO COUNSEL

"DO I GET A LAWYER TONIGHT' IS AN UNAMBIGUOUS INVOCATION OF A SUSPECT'S RIGHT TO COUNSEL

Commonwealth v. Miller, 486 Mass. 78 (2020).

Facts

At approximately 10PM on June 5, 2011, Wilfredo Martinez and Kareem Dowling were sitting on the back stoop of an apartment building near a basketball court. As they were speaking to their friend, the back door of the building burst open and Martinez and Dowling were both shot multiple times. Martinez died; Dowling survived. After an investigation, police arrested the defendant on July 24, 2011.

After his arrest, the defendant was brought to headquarters where he was given his Miranda warnings. Detectives gave the defendant a copy of the Miranda form and had him read along as the warnings were read to him one-by-one. The defendant initialed each warning as it was read. The detective and the form also gave the defendant an additional warning, "If you decide to answer now, you will still have the right to stop answering questions at any time." The defendant signed the form under the phrase, "I HAVE READ AND UNDERSTOOD THE ABOVE RIGHTS AS EXPLAINED TO ME."

The defendant was then interviewed for approximately twenty-five (25) minutes. During this interview, the defendant stated he was playing video games at the time of the shooting. Detectives told the defendant that they did not believe him. The defendant stood by his statement. At the end of the interview, the detectives asked if he wanted to call anyone. The defendant said, "I want to leave if I'm not under arrest." At that time, the defendant was told he was going to be placed under arrest. Detectives then made several attempts to help the defendant contact his family. The defendant was told he would be arraigned the next morning and that he was going to be taken to District 5 and would have his fingerprints taken. The detectives said, "if there's something you want to change, we're available." p. 84. The defendant then asked, "do I get a lawyer tonight?" The detective told him he would get a lawyer in the morning unless there was a lawyer the defendant knew that he wanted to call. At that time, the defendant called a family member and told them he needed a lawyer. The detectives spoke in "calm, businesslike tones" during the interview. p. 84

The defendant was taken to the police station in West Roxbury where he was booked. As part of the booking procedure, he signed another Miranda warning form. While being booked, Detective Kinkead saw the defendant. Detective Kinkead had known the defendant for five (5) or (6) months prior to his arrest. Detective Kinkead was not involved in the investigation of the shooting and was surprised to see the defendant being booked. She asked him what he was doing there. The defendant did not respond to her question. The booking continued and the detective continued on with her other duties. Later that night. Detective Kinkead walked by the cell area and the defendant called out to her, "hey, hey, hey. Come here for a minute." The detective asked what he was doing there. The defendant told her, "They got me in here on some bullshit murder tip." The detective asked what he was talking about. The defendant said, "I talked to detectives earlier. I want to talk to them again." pp. 85-86. Detective Kinkead then called a homicide detective. Detective Kinkead had no further communication with the defendant.

Detectives responded to the West Roxbury station and began a second interview with the defendant at 11:20PM. A detective advised the defendant of the Miranda warnings again, using the same procedure that was used for the first interview, using an identical form as the one he signed earlier. The defendant signed this form as well.

During this interview, the defendant gave a different account of what happened. The detectives told the defendant that he was not telling the truth and that they thought he shot the two (2) men who were sitting on the stoop. The defendant denied shooting anyone. The questioning continued and the detectives urged him to tell the truth. The defendant ultimately admitted he was at the shooting but denied pulling the trigger. The second interview was conducted in a professional manner.

The defendant filed a motion to suppress the statements. The defendant argued that the detectives did not scrupulously honor his invocation of his right to an attorney made at the end of the first interview. The defendant also argued that he did not intelligently, knowingly, and voluntarily waive his Miranda rights.

Discussion

Invocation of right to an attorney

"A defendant's decision to terminate questioning must be scrupulously honored." p. 88. When an individual invokes his/her right to an attorney during a custodial interrogation, "the police must stop the interrogation until counsel has been made available to the defendant, unless the accused himself initiates further conversation with the police." p. 87 *quoting* Commonwealth v. Moraganti, 455 Mass. 388, 296 (2009).

The invocation of a right to counsel must be clear and unambiguous. If a suspect makes an equivocal reference to an attorney, officers do not need to stop their questioning. The question is whether a reasonable officer in these circumstances would understand that the suspect was invoking his/her right to an attorney.

In this case, the defendant's statement, "do I get a lawyer tonight" was an unambiguous invocation of his right to a lawyer. The court found that the detectives recognized it as such by their actions. More specifically, the detectives did not continue the interrogation after that statement.

The defendant argued that officers improperly continued questioning him after his invocation. Relevant portions of the transcript of the interview are below:

> THE INTERVIEWER: "You want to call your mother again and have her bring a lawyer? Okay. That's fine."
>
> THE INTERVIEWER: "We're trying to be fair with you, you know that, right?"
>
> THE DEFENDANT: "Yeah."
>
> THE INTERVIEWER: "If you want to just dial the last number, just press that."
>
> THE INTERVIEWER: "If something were to change, if there's something we need to know, please make sure that we do, okay?"
>
> The defendant then spoke with his mother on the telephone. When he hung up, the interview then ended as follows:
>
> THE INTERVIEWER: You all set?
>
> THE DEFENDANT: [No audible response].
>
> THE INTERVIEWER: "What did she say?"
>
> THE DEFENDANT: "She's on her way."
>
> THE INTERVIEWER: "She's on her way. All right. You all set, bro? Is there anything else you want to tell us? You all good?"
>
> THE DEFENDANT: "Yeah."
>
> THE INTERVIEWER: "Like I said, we're going to take you downstairs and process you and just kind of move through the system here, all right, bro?"

The defendant argues that the questions, "If something were to change, if there's something we need to know, please make sure that we do, okay?" and "you all set, bro? Is there anything else you want to tell us? You all good?" were improper interrogation after an invocation of his right to counsel.

> "We conclude that the brief, somewhat ambiguous questions posed by the detectives do not constitute improper interrogation after the defendant had invoked his right to counsel." pp. 89-90.

The court noted that the statements need to be considered in context. Under the circumstances here, the statements were an "attempt to facilitate the telephone call, to finish the interview, and move the booking along." p. 90.

After the defendant invoked his right to counsel, it was the defendant, and not law enforcement, that reinitiated communication. Detective Kinkead's initial interaction with the defendant at the booking desk was not "interrogation" because she asked him what he was doing there out of personal concern for the defendant and not for the purpose of eliciting an incriminating response. Further, the defendant's request to speak to the homicide detectives again was voluntary and not something Detective Kinkead convinced the defendant to do.

Voluntariness of Miranda waiver

The defendant argues that his waiver of Miranda rights was not voluntary, intelligent or knowingly because of "confusing" statements detectives made about the right to counsel and because of "now or never" tactics used by detectives.

The court found that the detectives' statements about the defendant's right to counsel were accurate and not misleading. The defendant was told he would get an attorney in the morning unless he had a lawyer he wanted to call. At that point, the detectives then assisted the defendant in contacting his mother to try to contact a lawyer. Based upon these facts, the defendant's waiver of his rights when reinitiating contact with the detectives was knowing, intelligent and voluntary.

The court also found that the detectives did not utilize "now or never" tactics that have been condemned in other cases. The court discussed the facts of two (2) prior cases for comparison purposes. In Commonwealth v. Novo, 442 Mass. 262 (2004), "detectives falsely and repeatedly told the defendant that, if he did not answer their questions and present his side of the story to the detectives, the defendant would never get a chance to present his side of the story to the jury." p. 92. Detectives in Novo made these statements eighteen (18) times during the interview. The court found that this misrepresented the defendant's right to defend himself at trial and that the repetitive nature of the misrepresentation was an "egregious intrusion" on the defendant's right under the Massachusetts Declaration of Rights. The court found that this conduct cast "substantial doubt" on the voluntariness of the defendant's waiver.

The court also compared the facts of Commonwealth v. Thomas, 469 Mass. 531 (2014). In that case, the defendant invokes her right to counsel at which point she was told, "you had your chance, you just lawyered up." The court found that this implied that she no longer had the option to speak to police and that police were chastising her for invoking her right to counsel. This was improper because there is nothing stopping a suspect from reinitiating contact with officers after consulting with an attorney.

In this case, before the defendant invoked his right to counsel, the detectives told the defendant,

> "Sometimes there's reasons for things that we can't uncover in our investigation without someone telling us. We don't know. We're giving you this opportunity, so this is your chance. It might be your only chance to actually sit and tell us, so it's up to you what you want to do here. The ball is in your court." p. 92.

During the second interview, detectives explained further,

> "your right to counsel, once you're arraigned—[e]verything has to go through your attorney. Which we can still talk to you, but it has to go through your attorney. You won't be able to contact us anymore. Once we end this conversation here, that's pretty much it for your opportunity to talk to us as we're talking right now. Tomorrow clearly if you say to your attorney, 'I want to talk to them,' your attorney hopefully will listen to you and get in touch with us. But we can't contact you and say, 'Hey, we want to talk to you again.'" p. 94.

Unlike Novo and Thomas, this was not a misstatement of the law. The detectives correctly stated the law when they advised the defendant that, once arraigned, any communication would have to go through his attorney. In addition, the detective here did not chastise the defendant for invoking his right or misinform him about his right to testify at trial. "In sum, the police did not employ the "now or never" tactics we condemned in Novo and Thomas." p. 94.

CRIMINAL LAW UPDATES

AUTHENTICATION OF EVIDENCE

> "To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Mass.G.Evid. sec 901 (a).

At a trial, the party that is offering evidence must establish by a preponderance of the evidence that the item is what that party says it is. The judge acts as the "gatekeeper" of the evidence. This means that the judge is required to assess the evidence before it is put before the factfinder. If the judge is satisfied that the evidence is what its proponent says it is, the evidence will go to the factfinder. If the judge is not satisfied, the evidence will not be introduced.

Why is this important? Digital evidence is becoming more and more prevalent in all types of cases. In the case of text messages or posts on social media platforms, if the Commonwealth is alleging that the text or post was send by the defendant, then the Commonwealth must prove that

it was actually sent by the defendant. A text or post sent from the defendant's account will not be enough.

More often than not, there is no direct evidence to prove that the defendant was the author of the text or post and we must rely on circumstantial evidence to prove it. The cases decided this year highlight some of the facts and circumstances the court found sufficient to prove authentication.

AUTHENTICATION OF PHOTO AND INSTAGRAM MESSAGES

FACTS SUFFICIENT TO SHOW THAT EX-BOYFRIEND TOOK PICTURE OF VICTIM IN A STATE OF PARTIAL NUDITY

Commonwealth v. Castro, 99 Mass.App.Ct. 502 (2021).

Facts

The victim was in a relationship with the defendant that ended in 2015. After they broke up, they communicated on occasion through text messages. In October 2017, the victim received three (3) Instagram messages from the defendant on her cell phone. The victim knew the Instagram account was the defendant's because she "followed" the account, recognized the account name "letitflyceez" as that of the defendant, the profile photo was of the defendant, and she had seen him post things on the account in the past.

The first Instagram message was a screenshot of text messages the defendant had sent to the victim's cell phone wishing her a happy birthday. The second Instagram message said, "Wow, can't even say nothing back." The final Instagram message contained a photo of the victim lying in bed in the defendant's apartment. In the picture she was partially unclothed and it appeared as if she was sleeping. This message also said, "Maybe you will reply now" across the photograph. Upon seeing the photo, the victim "freaked out, started crying" and felt "threatened" and "scared."

> "She had never seen that photograph, was not aware that the defendant had taken the photograph, did not know that the photograph existed prior to receiving the message, did not consent to the taking of the photograph, did not want the photograph to be taken, and had 'never taken a nude picture.'"

The victim contacted the police and the defendant was charged and convicted of photographing an unsuspecting nude or partially nude person (MGL c 272 §105(b)). The defendant appealed the conviction arguing that the evidence was insufficient to prove the charge and that certain evidence should not have been admitted into evidence on authentication grounds.

Discussion

Sufficiency of the evidence
MGL c 272 § 105(b) punishes three (3) different acts:

> Whoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, with the intent to secretly conduct or hide such activity, when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, videotaped or electronically surveilled, and without that person's knowledge and consent, shall be punished…
>
> Whoever willfully photographs, videotapes or electronically surveils, with the intent to secretly conduct or hide such activity, the sexual or other intimate parts of a person under or around the person's clothing to view or attempt to view the person's sexual or other intimate parts when a reasonable person would believe that the person's sexual or other intimate parts would not be visible to the public and without the person's knowledge and consent, shall be punished…
>
> Whoever willfully photographs, videotapes or electronically surveils, with the intent to secretly conduct or hide such activity, the sexual or other intimate parts of a child under the age of 18 under or around the child's clothing to view or attempt to view the child's sexual or other intimate parts when a reasonable person would believe that the person's sexual or other intimate parts would not be visible to the public shall be punished…

The defendant here was charged under the first paragraph. In order to prove the charge, the Commonwealth had to prove five (5) elements beyond a reasonable doubt:

> (1) willfully photographed, videotaped, or electronically surveilled;
> (2) another person who was nude or partially nude;
> (3) with intent to secretly conduct or hide his activity;
> (4) when the other person was in a place and circumstance where she or he would have a reasonable expectation of privacy in not being so photographed; and
> (5) without the other person's knowledge or consent.

The defendant only contests the last three (3) elements. The defendant argued that the Commonwealth failed to show that he had the specific intent to hide his conduct. The court found that the evidence was sufficient on this point. In this case, the picture was taken of the victim when she was sleeping, without her consent or knowledge, and the defendant "withheld the existence" of the photograph from the victim until he sent it to her in 2017. These facts were enough to prove the statutory intent element.

The court also noted that the writing in the Instagram message, "Maybe you'll reply now," when viewed in the totality of the other evidence, could also be considered evidence of his intent to hide the fact that he took the picture. The court found that a

rational juror could have taken the written words as a threat that, together with the totality of the evidence at trial, was an,

> "implied admission by the defendant that he had secretly taken the photograph and withheld its existence in order to later leverage, coerce, threaten, harass, or intimidate the victim."

With respect to the fourth element, the defendant argues that the victim did not have a reasonable expectation of privacy in the bedroom of his apartment because of the intimate nature of their relationship at the time the picture was taken and "the absence of evidence of a specific ban on nude photography in their relationship." The appeals court was not persuaded by this argument.

> "Here, the victim was sleeping in her boyfriend's bedroom, a private place, and had a reasonable expectation of privacy in not having her partially naked body so photographed."

The court further found, "A person does not forever forfeit all privacy rights, without limitation, by engaging in intimate or personal contact with others."

With respect to the fifth element, at trial, the victim testified that she did not know the defendant had taken the photograph, that she did not want it to be taken and that she had never taken nude pictures. In addition, she was sleeping in the picture and did not know the picture existed until she received the Instagram message. These facts were sufficient to prove that the picture was taken without her knowledge or her consent. The court also found that the victim's "shock and fear" when she saw the photograph also supported the fact of her lack of knowledge or consent.

<u>Authentication</u>
The defendant also argued that the court should not have admitted the photograph and Instagram messages without sufficient authentication.

In this case, the defendant was charged with taking the photograph, not distributing it. To prove its case, the Commonwealth had to show that it was the defendant and not someone else that took the photograph of the victim. In addition to the photograph, the Commonwealth introduced the Instagram messages that contained the photograph into evidence. In order for the photograph and the messages to be admitted into evidence, the judge had to determine whether the Commonwealth had shown, by a preponderance of the evidence, that the photograph was taken by the defendant and that he was the author of the Instagram messages sent to the victim.

The court found that there was sufficient evidence presented in this case to introduce the photograph and the Instagram messages. With respect to the question of who took the photograph, the court noted that the photograph was taken of the victim while she was sleeping partially naked in the defendant's bed. In addition, the victim testified that she

only slept in a state of nudity or partial nudity when she was alone with the defendant in his apartment.

With respect to whether it was the defendant who sent the Instagram message, the Commonwealth must show facts, "beyond simply the fact that the message was sent from an account in the name of the alleged author." *citing* Commonwealth v. Meola, 95 Mass.App.Ct. 303, 314-315 (2019). The court found that the Commonwealth had met its burden and relied on several facts in making that decision. In this case, the victim was familiar with the Instagram account that sent the picture. She testified that the unique username, "letitflyceez" was the defendant's username, he always had the same account, she had seen other photos of the defendant on that account, she had seen him post things on that account, and the defendant's picture appeared in the "icon" of the account.

The victim also recognized the cell phone number that appeared in one of the Instagram messages. The victim testified that this was the number that she used to communicate with the defendant about things that only the victim and the defendant would know about. She also recognized the number as belonging to the defendant because she previously paid the cell phone bill for that number. In addition, the Instagram messages accurately referred to the victim's birthday and contained text messages that she had received on her cell phone from the defendant's number. For all of these reasons, the court found that the admission into evidence of the photograph and the Instagram messages were not error.

AUTHENTICATION OF TEXT MESSAGES

CONTENT OF TEXT MESSAGES AND DISTINCTIVE NICKNAME HELP AUTHENTICATE TEXTS SENT BETWEEN DEFENDANT AND MURDER VICITM

Commonwealth v. Welch, 487 Mass. 425 (2021).

NOTE: This is the third and last time we address the Welch case. This is the case involving the defendant in the ICU who was only able to communicate via notes due to his injuries. The facts summarized below are relevant to text messages that were introduced into evidence during the trial.

Facts

The defendant went to a bar on the evening of February 19, 2012. While he was there, he told the bartender he had recently lost his job and had been arrested for an OUI. He also complained that the victim had refused to pay his bail after he got arrested even though he had spent $70.00 on flowers for her for Valentine's day. The victim joined the defendant at the bar at some point that evening. They left together around 11:05 and the victim called 911 an hour later.

At trial the Commonwealth introduced several texts that were exchanged between the defendant's cell phone and the victim's cell phone between February 10 and February 18, 2012. These messages highlighted the "defendant's problem with alcohol, money, his

job, and tensions and arguments between the defendant and the victim." p. 440. The defendant argued that the texts were not properly authenticated.

Discussion

> "Where the Commonwealth seeks to introduce evidence of cell phone communications, 'the judge [is] required to determine whether the evidence was sufficient for a reasonable jury to find by a preponderance of the evidence that the [individual] authored' the communications." p. 440 *quoting* Commonwealth v. Webster, 480 Mass. 161, 170 (2018), *quoting* Commonwealth v. Purdy, 459 Mass. 442, 447 (2011).

Confirming circumstances may be used to authenticate text messages, such as,

> "acknowledgement that the defendant uses the cell phone, acknowledged ownership by a defendant of the cell phone containing the messages, and whether the defendant knows or supplies the passwords protecting the cell phone." p. 441.

The court found "abundant confirming circumstances" in this case. The cell phones here were found with the defendant and the victim, were registered to the defendant's and the victim's respective email accounts and both were password protected. In fact, police in this case had to use specialized software to access the phones.

The content of the messages themselves also linked the messages to the defendant. "The messages were replete with details of the defendant's and the victim's lives including tensions within their relationship, aspects of their living arrangements, and the suspension of the defendant's driver's license from his OUI charge." p. 441.

In this case, multiple messages from the victim to the defendant referenced a distinctive nickname. This nickname was linked to the defendant in other evidence. For instance, there was a text message referencing the defendant's intention to deliver flowers to the victim for Valentine's day, the defendant's complaints to the bartender included a reference to the flowers he bought for Valentine's day, and officers found flowers with a card with that distinctive nickname in the apartment.

"Taking all these confirming circumstances together, the evidence authenticating the text messages was overwhelming." p. 442.

CONTENT, SPELLING ERRORS AND SHEER VOLUME OF TEXT MESSAGES ENOUGH TO AUTHENTICATE EX-BOYFRIEND AS AUTHOR OF TEXTS AND TO PROVE KNOWLEDGE OF RESTRAINING ORDER

Commonwealth v. Gonsalves, 99 Mass.App.Ct. 638 (2021).

Facts

After a year of dating, the victim ended her relationship with the defendant on December 30, 2016. She obtained a restraining order against him on January 4, 2017 which ordered the defendant not to contact her.

From January 5 to January 11, before he was served with the order, the defendant sent the victim over 100 text messages. Some of the messages called her names including "Rat bitch" while others threatened her with violence. Some did both. Some examples of the text messages include:

> "So you put papers on me bitch lol…trust me that's not going to stop me believe me my nieces will be seeing u 'real soon."
>
> "They don't mean shit tell they give them to me I'm not new to this bitch."
>
> "Who gave you the idea that a peace of paper is going to stop you from getting your ass kick from my nieces lol."

Some of the texts indicated that the defendant knew the police were trying to serve the order on him. For example:

> "Well I'm in Boston right now tell the cops to stop looking for a ghost it was a waste of your day sitting at the court house for that shit anyways".
>
> "Tell the cops to stop going by because I'll be away for a while."

The defendant argues that, because there was no service of the order, the Commonwealth failed to prove he had knowledge of the terms of the order. The defendant also argued that the text messages should not have been admitted into evidence because they were not properly authenticated.

Discussion

Notice of restraining order

To prove a violation of a restraining order, the Commonwealth must prove that the defendant knew the terms of the order. When there is no official service of the order,

> "the Commonwealth can still meet its burden by presenting other evidence sufficient to prove 'that the defendant had actual knowledge of the terms of the order or was put on sufficient notice to make reasonable inquiry concerning the

> issuance and terms of the order.'" *quoting* Commonwealth v. Welch, 58 Mass.App.Ct 408,410 (2003).

The Commonwealth in this case presented sufficient evidence to prove that the defendant either had actual knowledge that his conduct violated the 209A order or that he had sufficient notice of the order that he should have made reasonable inquiry as to its terms.

In the text messages he sent, the defendant admitted that he knew that the victim "put papers on him" and telling her that a piece of paper would not protect her. He also admitted his own familiarity with restraining orders, the concept of service, and expressed an awareness that officers were looking for him in an attempt to serve him. "This evidence was sufficient to prove that the defendant had actual or constructive knowledge of the terms of the 209A order."

The court further found that,

> "the jury could have found that knowledge of the existence of the 209A order would have prompted a reasonable person to make inquiry of its terms before sending threatening messages and continuing to send messages for the next six days."

The jury could also have found, based upon the content of the text messages that the defendant was evading service.

> "The defendant could not, in these circumstances, 'shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received.'" *quoting* Commonwealth v. Delaney, 425 Mass. 587 (1997), *quoting* Commonwealth v. Olivo, 369 Mass. 62 (1975).

Authentication of text messages

The defendant argued that the text messages were not properly authenticated. To be admissible, the Commonwealth was required to prove that the defendant was the author of the text messages. At trial, the victim testified that she recognized the cell phone number as the defendant's cell phone number and stated that she had never been contacted by anyone else using that number. "The judge appropriately determined that the absence of any prior 'mistaken communications' supported a finding of authenticity."

The court also indicated that the contents of the texts themselves pointed at the defendant as the author because they contained references to "particular knowledge of contemporaneous events" and contained "recurring spelling errors" which the victim testified was typical of communications she received from the defendant. During the one (1) week period of time the victim had received over 100 text messages. "The sheer number of messages that were sent also supported a finding that the defendant authored them."

The evidence in this case, despite its circumstantial nature, was sufficient to prove by a preponderance of the evidence, that the defendant was the author of the text messages. The was no error in admitting the screen shots of the text messages into evidence.

AUTHENTICATION OF SURVEILLANCE VIDEO

OFFICER TESTIMONY OF STEPS HE TOOK TO OBTAIN VIDEO FOOTAGE SUFFICIENT TO PROVE VIDEO WAS FROM THE HOTEL IN HUMAN TRAFFICKING CASE

Commonwealth v. Gonzalez, 99 Mass.App.Ct. 161 (2021).

Facts

The defendant and his brother, Elvin Gonzalez, were drug dealers in Worcester. The defendant's brother also ran a prostitution ring that was supervised by Bradley Alberini. The prostitution ring involved five (5) women who would perform sexual acts for money, usually in hotel rooms. The women would turn the money over to the defendant's brother in exchange for drugs. The value of the drugs was less than the money turned over to the defendant's brother. "One woman testified that she was incentivized to schedule more 'dates' because the amount of drugs that she received had started to decrease." p. 162.

The defendant supplied his brother with the drugs that were given to the women. Witnesses testified that the defendant occasionally delivered the drugs directly to the hotel rooms. When he did so, the women would talk openly on the phone about their "dates" in the presence of the defendant and the women did not try to hide their activities from him. The defendant often drove his brother and Alberini to and from a hotel. Alberini spoke openly about the prostitution operation with the defendant during some of those rides.

> "On one occasion the defendant drove one of the women to an 'outcall' -- a meeting to exchange sexual services for money at a location designated by the client. On another occasion the defendant rented a hotel room in furtherance of the operation. Alberini saw the defendant make a transaction at the front desk, and the defendant then gave Alberini and Elvin a room key." p. 163.

The defendant was convicted of five (5) counts of deriving support from prostitution and one (1) count of human trafficking. The defendant appealed the convictions on several grounds. The court found that an error was made during jury selection and vacated the convictions on those grounds. The court also considered the sufficiency of the evidence presented against the defendant for purposes of determining whether the defendant could be retried on the charges. The court also addressed whether surveillance video from a hotel was properly authenticated.

Discussion

Deriving support from prostitution.

> "General laws c. 272 § 7 provides that '[w]hoever, knowing a person to be a prostitute, shall live or derive support or maintenance, in whole or in part, from the earnings or proceeds of his prostitution ... or shall share in such earnings, proceeds or moneys, shall be punished.' To sustain the convictions under this statute, the Commonwealth had to prove that the defendant 'knowingly and intentionally' profited from the prostitution of another." p. 168.

> "The evidence was sufficient to establish that the defendant knew that the women involved in the operation were engaged in prostitution. The defendant discussed the operation with Alberini and on multiple occasions was in the hotel rooms where the women talked openly about their 'dates' in the defendant's presence. Furthermore, the jury could have found that the defendant profited and intended to profit from the operation. The defendant supplied the drugs that were given to the women and received money in return. He also gave Elvin and Alberini rides to the hotel, drove one woman to an 'outcall,' and rented a hotel room for the operation. This was sufficient to permit a jury to conclude that the defendant had the requisite intent to profit." pp.168-169.

Trafficking of a person for sexual servitude

> "General Laws c. 265 § 50(a), provides in relevant part that: 'Whoever knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity ... or causes a person to engage in commercial sexual activity ... or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i), shall be guilty of the crime of trafficking of persons for sexual servitude.'" p. 169.

> "'Commercial sexual activity' is defined as 'any sexual act on account of which anything of value is given, promised to or received by any person.' G. L. c. 265, § 49." p. 169.

The focus of this statute is the intent of the suspect, not how the criminal act is accomplished. Neither force nor coercion are required to commit human trafficking. There is also no requirement that a defendant benefit financially from the activity to be guilty of human trafficking. However, in this case, there was evidence that the defendant did benefit financially from the prostitution ring being run by his brother.

In this case, the court found there was enough evidence presented to the jury that the defendant knowingly enticed and recruited one (1) of the women. The court noted that the jury could have found that the defendant supplied the drugs that were used as

payment and incentive for the woman to participate in the prostitution ring. There was also evidence that the defendant assisted the operation in different ways which facilitated its continuation, knowing that doing so would result in the woman's "anticipated engagement in commercial sexual activity." (citation omitted) p. 169.

The court found that there was sufficient evidence in this case to retry the defendant.

Authentication of surveillance video

The Commonwealth introduced surveillance footage from one of the hotels into evidence. The defendant argued that the video should not have been admitted because it was not properly authenticated.

The question here is whether the video that was entered into evidence was what the Commonwealth claimed it was, that being surveillance video from that particular hotel.

In this case, the officer met the manager of the hotel and they went to the surveillance video system and searched for particular files. There the files were copied to a flash drive which the officer then copied to a compact disc and turned over to the prosecutor.

> "This foundational testimony supported the judge's finding that, because the officer was 'directed to the source of the surveillance video which was kept under the control of that hotel' and 'the management was in a position of pointing out the specific files that dealt with the [relevant] timeframe,' 'a reasonable fact finder could conclude this evidence is what the proponent claims it to be; that is, surveillance video for the particular hotel." p. 171.

AUTHENTICATION OF A COPY OF THE SURVEILLANCE VIDEO

CELL PHONE VIDEO TAKEN BY OFFICER OF HOME SURVEILLANCE FOOTAGE WAS PROPERLY AUTHENTICATED

Commonwealth v. Davis, 487 Mass. 448 (2021).

Facts

At approximately 10:30AM on September 15, 2015, there was a shooting at the corner of Baker Avenue and Quincy Street in Dorchester. Police received a 911 call reporting the shooting at 10:28AM. Upon arrival at the scene, officers found an unoccupied blue sedan that had crashed into a light pole. The car also had several bullet holes in the windshield. When officers canvassed the area, they found a residence with a video camera affixed to it. The officer spoke to the resident who showed the officer the video. The resident did not know how to download or copy the video. The officer recorded the video as it played on a computer screen using his cell phone.

The surveillance video was of poor quality but showed a Black male with long hair in either braids or dreadlocks wearing a pink or red long-sleeved shirt. This man was running down the street with his arm raised while holding a handgun. The video then shows a blue sedan coming from the opposite direction and collides with a light pole. The driver is seen getting out of the car and running away.

At 10:30AM, a witness, Ilene Rock, was standing on a corner a couple of blocks away from the shooting. She testified that she heard a noise "like gunshots or a car backfiring." Shortly after hearing the noise, she saw a Black male with thin braids run past her with his hands in his pockets. She did not get a good look at the male's face and was unable to identify him from a photo array.

As part of their investigation, officers inquired as to whether anyone wearing a GPS device was in the area at the time of the shooting. They were provided with GPS location and speed data for the defendant which was introduced at trial. Approximately one (1) week after the shooting, officers obtained a search warrant for the defendant's home. They seized a long-sleeved red sweatshirt under a pile of clothes. The shirt tested negative for gunshot primer residue.

The defendant was convicted of multiple charges, including armed assault with intent to murder. The defendant raised numerous issues on appeal. The court overturned the verdict after finding that the speed calculations from the GPS device should not have been admitted into evidence because the Commonwealth failed to establish that the GPS device used here was reliable when calculating speed.

Because the matter has the potential for a retrial, the court addressed other issues raised in the appeal. One of those issues was the authentication of the surveillance video. The defendant argues that the surveillance video itself, not the cell phone video of that recording, was not properly authenticated.

Discussion

There are typically two (2) ways to authenticate a surveillance video: "[h]aving an eyewitness testify that the video is a fair and accurate representation of what he saw on the day in question or having someone testify about the surveillance procedures and the methods used to store and reproduce the video material." p. 465-466 *quoting* Commonwealth v. Connolly, 91 Mass.App.Ct. 580, 586 (2017). The court notes that these are not the only ways to authenticate a video and that authentication can be proven by circumstantial evidence.

In this case, the issue was not the cell phone video. The testimony of the officer was sufficient to show that the video that was played was what the Commonwealth purported it to be – a video that the officer had taken on his cell phone on the date of the incident. The issue was the surveillance video itself. The Commonwealth had the burden of proving that the video shown in the cell phone video was what the Commonwealth purported it to be – video of the scene at the time of the event.

The court found that there was "plentiful" circumstantial evidence to authenticate the video surveillance in this case. The court noted that the officer was on scene, saw a blue car crashed into a utility pole, and the driver's door was open. Across the street from the car the officer found several shell casings and bullet fragments. The jury also saw multiple still photographs of the scene which showed the car that matched the color and design of the car seen in the video crashing into the utility pole. One of those pictures showed a sign in front of the car advertising a church. The surveillance video showed that same sign in front of the car. In addition, the officer saw the video camera and went to the resident in the immediate aftermath of the incident and viewed the video. "That mitigates concerns that the video could have been manipulated." p. 467. The court also relied on the testimony of the eyewitness in reaching its decision. She testified to hearing either gun shots or a car backfiring and to seeing a black man with braids wearing a red shirt in that area which also corroborated what was seen in the video.

Based upon the testimony of the officer, the photographs of the scene, and the eyewitness testimony, there were enough facts to corroborate and properly authenticate the surveillance video in this case. The court did not abuse its discretion in admitting the cell phone footage of the surveillance video.

IDENTIFICATION EVIDENCE

UNDERCOVER OFFICER'S IN-COURT IDENTIFICATION OF DEFENDANT IMPROPER

Commonwealth v. Ortiz, SJC-12975 (June 8, 2021).

NOTE: this is the same Ortiz case previously addressed in the search and seizure section. The facts summarized below are relevant to the issue of the in-court identification made at trial by the undercover officer.

Facts

In February 2018, the Springfield Police Department was investigating drug dealing by the defendant and his brother. On February 15, 2018, an undercover officer (UC) called the defendant who agreed to sell narcotics to the UC. The UC ultimately purchased twenty (20) bags of heroin from the defendant. After the sale, the UC left the car and other officers stopped and arrested the defendant.

At trial, the UC made an in-court identification of the defendant. The defendant argues that this was error because it was unnecessarily suggestive.

Discussion

An in-court identification of a defendant is an inherently suggestive "showup" identification. A witness who has not participated in a prior identification procedure will not be allowed to identify the suspect in court unless there is "good reason" to do so.

Courts have found that there is "good reason" to allow an arresting officer to make an in-court identification of a defendant because the officer is merely confirming that the defendant is the person who was arrested. An officer who participated in the investigation but did not participate in the arrest of the suspect, such as the UC in this case, is different because they are identifying the defendant based solely upon their memory of the criminal activity. The court found that there is no "good reason" to allow such an officer to make an in-court identification without having previously participated in a non-suggestive identification procedure. For these reasons, the UC's in-court identification of the defendant in this case was improper.

In this case, because of the other evidence presented on the identification issue, there was no prejudice to the defendant so it ultimately did not affect the outcome.

TRANSFERRED INTENT

ACT OF POINTING GUN AT A RIVAL ON A CROWDED STREET, WITHOUT MORE, NOT ENOUGH TO PROVE INTENT TO KILL NECESSARY TO FIND DEFENDANT GUILTY OF FIRST DEGREE MURDER OF INNOCENT BYSTANDER SHOT BY THE RIVAL

Commonwealth v. Colas, 486 Mass. 831 (2021).

Facts

In August 2014, a crowd of people had gathered on Blue Hill Avenue in Dorchester waiting for a parade to start. The defendant was there with a companion and they went into a convenience store. Keith Williams, Jordan Reed and Brian Joyce also went into the store. Looks and stares were exchanged between the two (2) groups, creating tension in the store. The defendant and his companion exited the store a couple of minutes later. The defendant left momentarily while his companion lingered outside the store. Reed and Joyce exited the store and exchanged more glares and aggressive words with the defendant's companion. Williams, Reed and Joyce then headed up McLellan Street. The defendant rejoined his companion and they followed the other men.

Two (2) witnesses saw the defendant produce a handgun from his waistband as he faced the men up the street. Both witnesses testified that they did not see the defendant point or fire the gun at anyone. Another witness testified that he observed the tense situation in the store and saw the hostilities continue outside. While on the street, this witness overheard the companion tell the defendant, "[j]ust keep calm, this will all be over in a second." p. 835. This witness testified that he saw the defendant,

> "who was holding a 'pistol' by his side, raise it and point it in the direction of McClellan Street (which is also in the direction toward where [the witness] was standing)." p. 835.

The witness turned and ran away. He testified that he heard shots fired in the distance.

On the street, Williams was also holding a firearm. Someone in his group yelled, "blast them, blast them," or similar words. Williams fired four (4) or five (5) shots at the defendant. The defendant was not struck by the bullets; however, two (2) bystanders were shot and one died.

The defendant and Williams were both charged with murder in the first degree on the theory of deliberate premeditation, armed assault with intent to murder and assault and battery by means of a dangerous weapon. The defendant was convicted on all charges.

Discussion

Intent to kill

To prove murder in the first degree, the Commonwealth must prove, among other things, that the defendant intended to kill a person. It was clear in this case that the defendant did not intend to kill the innocent bystander; however, "[i]f a defendant intends to kill one person, and mistakenly kills another, under the doctrine of transferred intent the defendant is treated as though he or she intended to kill the other individual." p. 837. The question is whether the Commonwealth proved that the defendant intended to kill Williams.

Direct evidence of a defendant's intent is rare, but intent can be proven by circumstantial evidence. "The act of pointing at someone is not, standing alone, sufficient 'use' of that firearm to infer an intent to kill." p. 837. The court looked at different cases that considered what facts could prove an intent to kill.

In Commonwealth v. Lewis, 465 Mass. 119 (2013), the defendant twice pointed a loaded gun at a police officer. The court found that pointing a loaded gun at an officer could be evidence of an intent to merely deter or frighten the officer and was not enough to prove an intent to kill beyond a reasonable doubt. However, the court found that an inference of an intent to kill was reasonable the second time the defendant aimed the gun at the officer because, by that time, the officer had shot the defendant.

> "'Having failed to deter [the police officer] in his pursuit, having failed to avoid apprehension by pointing a gun at [the police officer], and having been shot twice, the defendant's persistence in pointing a loaded gun at the man who just wounded him with lethal force' was circumstantial evidence of an intent to kill." p. 838 *quoting* Lewis at 126.

In other cases, courts have found sufficient evidence of an intent to kill when a defendant has pulled the trigger. Commonwealth v. Gordon, 41 Mass.App.Ct. 459 (1996). In Commonwealth v. Tavares, 471 Mass. 430 (2015), the defendant and the victim argued and it developed into a barroom brawl. As others fought inside, the defendant left the bar and returned with a handgun. He then waited outside for the others involved in the fight to leave the bar. When the victim exited, the defendant pointed the gun at the victim and tried to chamber a round of ammunition "so that the gun could be fired at any moment." At that point, a codefendant grabbed the weapon from the defendant. The defendant then

ran behind the codefendant as he chased and shot the victim. Based upon the facts of that case, the court affirmed the conviction "because the defendant's knowledge of the circumstances, and his participation in the crime, supported an inference that he shared his codefendant's intent to kill." p. 839.

The facts here do not have the sort of circumstances described in Lewis and Tavares.

> "[T]here is no evidence that the defendant possessed a loaded firearm, did anything 'so that the gun could be fired at any moment', or chased down the intended target to finish him off. There also is no evidence that the defendant fired the gun either before or after Williams fired at him." p. 839.

Based on the facts of this case, the Commonwealth could not meet its burden to prove beyond a reasonable doubt that the defendant intended to kill Williams. For that reason, the defendant's conviction for first degree murder was overturned; however, that does not mean that the defendant cannot still be criminally responsible for the death of the bystander.

The facts here could convince a jury that the defendant is guilty of murder in the second degree under the third prong or "depraved heart" malice. This requires proof that the "defendant had an intent to commit an act that, in the circumstances known to him, created a plain and strong likelihood of death." p. 840.

> "In particular, a reasonable juror could have concluded from the evidence introduced at trial that the act of pointing a firearm at a rival, on a crowded street, likely would provoke a deadly response, thereby demonstrating an indifference to human life." p. 840.

"The same evidence also could have supported a conviction of involuntary manslaughter as an unintentional, unlawful killing caused by wanton and reckless conduct." p. 841. The case was remanded to the Superior Court for a new trial on the charge of murder in the second degree.

Assault and battery by means of a dangerous weapon

ABDW is a general intent crime, meaning that the Commonwealth does not have to prove that the defendant intended to injure anyone. "[I]t is only required to prove a general intend to do the act causing the injury." p. 841. Causation can be proved with evidence that:

> "the defendant either directly caused or directly and substantially set in motion a chain of events that produced the serious injury in a natural and continuous sequence." p. 842 *quoting* Commonwealth v. Marinho, 464 Mass. 115, 119 (2013).

The facts and circumstances of this case, "established that the defendant set in motion a chain of events that culminated in [the victim's] injury. Accordingly, the evidence was

sufficient to allow the jury to convict the defendant of the offense of assault and battery by means of a dangerous weapon." p. 842. The conviction on the charge of ABDW was affirmed.

CONTROLLED SUBSTANCES

SCHOOL OR PARK ZONE STATUTE (MGL c 94C §32J)

A PUBLIC PARK MUST BE OWNED OR MAINTAINED BY A GOVERNMENTAL ENTITY.

Commonwealth v. Boger, 486 Mass. 358 (2020).

Facts

Manchester-by-the-Sea detectives were conducting a drug "sting" operation in which an officer placed an ad on Craig's List, "looking to SKI", a slang term for cocaine. Police received an email in response to the ad and ultimately agreed on a price for a quantity of cocaine. The meet location was a parking lot for The Cathedral of the Pines, a recreation area consisting of several thousand acres that is open to the public. There was testimony that some of the land was owned by the towns of Manchester-By-The-Sea and Essex.

The defendant arrived at the meet location and provided cocaine to the undercover detective. There was no evidence presented regarding where the drug deal took place in relationship to the tracts of land owned by Manchester-by-the-Sea and/or Essex.

The defendant was charged and convicted of distribution of cocaine (MGL c 94C § 32A(a)) and with committing that crime within one hundred feet of a public park (MGL c 94C § 32J). The defendant appealed the conviction of the school/park zone violation arguing that the Commonwealth did not meet its burden of proving that the area in question was a public park.

Discussion

MGL c 94C § 32J provides:

> "Any person who violates the provisions of section …32A…within 100 feet of a public park or playground…shall be punished."

The defendant did not contest that the area was a park. The focus of the appeal was whether the area was a public park. "[W]here 'public' is used as a modifier, it typically denotes governmental ownership or control." p. 360. The court found that this definition is consistent with how the courts have interpreted the words, "public park" in other contexts.

The court rejected the argument that "public park" should include privately owned parks that are accessible to the public. This argument was rejected because criminal statutes must be construed narrowly and each word in a statute is expected to have meaning. To

apply the statute to privately owned parcels would make the statute applicable to a larger number of spaces and defendants who would then be subject to enhanced penalties. The court noted the legislative intent to limit the applicability of the statute. In 2012, the Legislature recognized the disparate impact the statute had on minority communities in urban areas. To address this disparity, the Legislature amended the statute, reducing the school zone from 1,000 feet to 300 feet and restricting its application to between 5AM and midnight. The court found that if the public park definition were to be broad enough to include privately owned land, then it would likely lead to similar, unintended, and disparate impacts on urban areas.

The court also noted that including privately owned land in the definition of "public park" would make the word "public" superfluous. In Commonwealth v. Matta, 483 Mass. 357 (2019), the court adopted a definition of "park" as "a tract of land that is both set apart for, or open to, the public for recreational use. Id at 373. If the Legislature intended to include privately owned land that was open to the public, there would be no need to add the word "public" to the statute.

> "[T]he Legislature intended that a public park under the statute is a tract of land that is (1) set apart or dedicated for public enjoyment or recreational use, and (2) owned or maintained by a governmental entity." p. 362.

In this case, there was no evidence that the drug transaction took place within one hundred feet of an area owned or maintained by a government entity. The park zone conviction was overturned.

PROPERTY DOES NOT HAVE TO BE WELL MAINTAINED TO BE A PARK

Commonwealth v. Ramos-Cabrera, 486 Mass. 364 (2020).

Facts

On February 15, 2017, an undercover officer conducting a drug operation made contact with the defendant. The undercover officer asked the defendant for "brown", slang for heroin. The defendant got into the officer's car and they drove to a nearby building adjacent to an area known as Valley Arena park. The defendant got out of the car, met with another person, and they went inside a building. Both individuals returned a short time later. At that time, the defendant handed the officer four (4) bags of heroin and the other person accepted the officer's money.

The defendant was arrested and charged with distribution of heroin (MGL c 94C § 32(a)) and committing that crime within one hundred feet of a public park (MGL c 94C § 32J).

Valley Arena Park is owned by the city of Holyoke. An employee for the city's parks and recreation department testified at trial that the park was open, accessible and in use, but also testified that it was in "poor shape" and described the park as "frightful, basically a blight."

> "She further testified that in the late 1990's, the Department of Environmental Protection informed the city that no activities were to be held there because the soil was declared to be contaminated." p. 367.

The defendant was found guilty of both charges. The defendant argued on appeal that there was insufficient evidence to prove that the area was a public park within the meaning of the statute.

Discussion

As the court held in Boger, "a 'public park' under § 32J is a 'tract of land that is (1) set apart or dedicated for public enjoyment or recreational use, and (2) owned or maintained by a governmental entity." (*quoting* Boger) p. 367. The statute does not require that the area be well maintained to be considered a park. The Commonwealth presented evidence to meet the definition of a public park. The conviction was upheld.

PROOF THAT SUBSTANCE IS A CONTROLLED SUBSTANCE

VISUAL INSPECTION ALONE NOT ENOUGH TO MEET THE COMMONWEALTH'S BURDEN OF PROOF

Commonwealth v. Haltiwanger, 99 Mass.App.Ct. 54 (2021).

Facts

The defendant was indicted of various drug offenses, including possession with intent to distribute a class E substance (cyclobenzaprine), subsequent offense. The drugs were seized during the execution of search warrants on the defendant's car, apartment, and his girlfriend's car, which he was driving at the time of the search.

The defendant raised several issues on appeal, the majority of which involved the procedure the court used when the defendant waived his right to counsel. The defendant also argued that the Commonwealth failed to meet its burden of proving that the class E substance was, in fact, a class E substance.

Discussion

The pills involved in this case were not chemically analyzed.

> "[I]n the absence of chemical analysis, visual inspection of the pills was insufficient to prove beyond a reasonable doubt the chemical composition of the supposed class E pills in the defendant's possession."

The convictions involving the pills were reversed.

JUVENILE

MGL c 119 § 52 was amended in 2018 and redefined the term delinquent child to mean:

> "a child between 12 and 18 years of age who commits any offense against a law of the commonwealth; provided, however, that such offense shall not include a civil infraction, a violation of any municipal ordinance or town by-law or a first offense of a misdemeanor for which the punishment is a fine, imprisonment in a jail or house of correction for not more than 6 months or both such fine and imprisonment." (emphasis added)

The court considered this definition in Wallace W. v. Commonwealth, 482 Mass. 789 (2019). In the Wallace case, the court recognized the legislature's intent to give children a "second chance" to avoid prosecution of a minor offense. It clarified that this definition means that the juvenile court does not have jurisdiction over children between the ages of 12 and 18 years old who commit a first offense "minor" misdemeanor.

For purposes of this section, we will use the following definitions:

> minor misdemeanor - any offense that allows for a maximum punishment of either a fine or imprisonment in a jail or house of correction for not more than 6 months or both.
>
> major misdemeanor – all misdemeanors that are not "minor."

In Wallace, the court clarified that if a child between 12 and 18 years old has no prior record and has a single charge for a minor misdemeanor, that charge must be dismissed. The juvenile court does have jurisdiction over children between 12 and 18 years old who have previously been adjudicated a delinquent child who are then charged with a minor misdemeanor.

The Wallace case also set out a process by which the juvenile court can exercise jurisdiction over a juvenile who has committed a minor misdemeanor after that child has committed a prior offense but was not adjudicated a delinquent child for the prior offense. In such cases, the Commonwealth would notify the clerk that they intend to prove multiple offenses and the juvenile can request an evidentiary hearing on the issue.

This year the court decided Commonwealth v. Manolo M. which considered what happens when a juvenile with no prior offenses commits multiple offenses, all of which are "minor" misdemeanors without having committed a prior offense and what to do when a juvenile with no prior adjudications commits a felony or major misdemeanor along with minor misdemeanors.

Commonwealth v. Manolo M., 486 Mass. 678 (2021).

Facts

Brockton Police were dispatched to the high school at dismissal time on October 3, 2019 because there was a large crowd of teenagers walking in the street not allowing traffic to pass. Officers unsuccessfully tried to disperse the crowd with their PA system, lights and siren. Frederick F., yelled, "Fuck the police!" The officer exited his cruiser and approached this youth. A co-defendant, Angela A, put a cell phone in the officer's face. The officer instructed her several times to remove the cell phone from his face. When she refused, the officer pushed her hand away from his face. At this time, another individual got into a physical altercation with the officer and was placed under arrest. As Officer Vaughn attempted to keep the crowd away from the arrest, Manolo M. tried to run past him. Officer Vaughn pushed Manolo M. back several times at which point Manolo M. got into a "fighting stance" and yelled, "Mother fucker you wanna go! Let's go". Manolo M. then swung at the officer. A physical altercation ensued as Officer Vaughn tried to handcuff Manolo.

As officers tried to disperse the crowd, Frederick F. started yelling and refused to move along, encouraging the crowd to stay. Officer Vaughn told Frederick F. that he was under arrest and to put his hands behind his back. Frederick F. tensed up, pulled away from officers and threw his arms away from the officers. Frederick F. was warned to comply or that a stun gun would be used. Frederick F. continued to ignore officers' commands and received a three-second drive stun at which point officers were able to handcuff him.

While officers struggled with Frederick F., Angela A. approached officers, filmed them at close range and swore at them. She refused multiple orders to step back and then officers attempted to arrest her. She pulled away from officers and refused to put her hands behind her back. After a warning, she was given a one-second burst of pepper spray and was placed in handcuffs.

All three of the arrestees were 17 years old and had not previously been charged with any criminal conduct. All of the juveniles were charged with disorderly conduct and disturbing the peace (minor misdemeanors), resisting arrest (a major misdemeanor) and inciting a riot (a felony). Manolo M. was also charged with assault and battery on a police officer (a major misdemeanor), and common law interfering with a police officer (a minor misdemeanor). Frederick F. was also charged with common-law interfering with a police officer (a minor misdemeanor).

Discussion

Minor misdemeanor charges must be dismissed

The court determined that all of the minor misdemeanors must be dismissed for each of the juveniles. The juveniles had not previously committed any criminal conduct so they were entitled to the "second chance" outlined in MGL c 119 § 52 and *Wallace.*

It did not matter that each of the juveniles was facing multiple charges. When granting juveniles the "second chance," the legislature intended to distinguish between a single incident of minor misconduct which deserves a second chance, and a pattern of such behavior which does not. When multiple charges arise from one event, the juvenile is entitled to a dismissal of any minor misdemeanors if the juvenile has not previously committed any criminal conduct.

Under the plain reading of the statute, the "second chance" does not apply to any charges that are not minor misdemeanors. In cases such as this, a juvenile is entitled to a dismissal of some charges, but not others. Applying the analysis to the charges here, the disorderly conduct, disturbing the peace and the interfering with a police officer charges must be dismissed for each of the juveniles. The resisting arrest charge against each of the juveniles and the assault and battery on a police officer charge can proceed.

Inciting a riot charges

MGL c 264 § 11 state, in part:

> "Whoever by speech or by exhibition, distribution or promulgation of any written or printed document, paper or pictorial representation advocates, advises, counsels or incites assault upon any public official, or the killing of any person, or the unlawful destruction of real or personal property, or the overthrow by force or violence or other unlawful means of the government of the commonwealth or of the United States, shall be punished…"

The Commonwealth conceded that this charge should be dismissed against Frederick F. and Angela A. The Commonwealth argued that Manolo M. violated the statute when he took up a fighting stance and yelled, "Mother fucker you wanna go! Let's go!"

> "These words, in combination with his fighting stance and attempts to hit Vaughn, may be sufficient to establish probable cause of an assault and attempted battery against the officer, but they were not speech that 'advocates, advises, counsels or incites" anyone else to assault the officer.'"

There was no information in the complaint in which to infer that Manolo M. intended or desired anyone to join him in his assault of the officer. The court dismissed the charge.

The court noted that it did not reach the question of whether MGL c 264 § 11 was constitutional; however, it warned that it had the potential to conflict with the freedom of speech. The court cautioned that the statute must be read consistently with the limiting language of Brandenburg v. Ohio, 395 U.S. 444 (1969), a U.S. Supreme Court case in which the court interpreted a similar statute and held that,

> "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.... A statute which fails to draw this

distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments [to the United States Constitution]. It sweeps within its condemnation speech which our Constitution has immunized from governmental control." *Id*. at 447-448.

USE OF FORCE

CRIMINAL ASSAULT AND BATTERY CONVICTION OF OFFICER UPHELD AFTER COURT FINDS THE USE OF OC SPRAY AND BATON WERE NOT JUSTIFIED BY POLICE PRIVILEGE

Commonwealth v. Garvey, 99 Mass.App.Ct. 139 (2021).

Facts

The defendant in this matter was a police officer for the Massachusetts Bay Transportation Authority (MBTA). On the date in question, the defendant was working at the Dudley Station bus terminal. She was asked by a bus inspector to assist with a drunk passenger on a bus who was causing a disturbance. The defendant got the passenger, who appeared to be intoxicated, out of the bus and sat her on a bench. The defendant called for back-up and Officers Trinh and Curry responded.

The victim in this case was a passerby who saw the defendant with the passenger. The victim was familiar with the passenger from her daily commute. The victim saw the defendant leaning over the bench and yelling at the passenger and went to the bench area in an attempt to calm the passenger after she heard the passenger call out for help.

The victim testified that the passenger appeared to be under the influence and was not being cooperative with the defendant. When the passenger tried to leave the area, she was shoved back down to the bench by the defendant. At one point, the passenger produced a bottle of vodka from her bag and brought it to her lips. The defendant responded by aggressively "slapped the bottle" from her hands, picked up the passenger by the coat and placed her in handcuffs. The passenger was never arrested.

The victim in this matter called 911 because she believed the actions of the defendant were not appropriate. She asked the defendant for her badge number. The defendant responded, "it's 6-7-7-, no[w] get the fuck out of my way before I arrest you for impeding on an ongoing investigation." p. 141. The victim moved to the side but did not leave the bench area.

As the victim was on the phone with 911, the defendant started pushing her backwards and threatened her with oleoresin capsicum (OC) spray. The defendant pushed the victim with one hand as the victim was walking backwards and then sprayed her with OC spray twice in the eyes. A struggle ensued between the victim, the defendant, and Officer Trinh. During the struggle, the defendant struck the victim in the shins with her baton

multiple times. During this same time frame the victim's arms were flailing and hit both the defendant and Officer Trinh.

The victim was arrested, handcuffed and placed into a cruiser. The heat in the vehicle activated the OC spray burning the victim's face, ears, and eyes. After she was booked, she was transported to a hospital where she was treated for injuries to her legs and wrists.

The defendant wrote an arrest report the same day. This report was the basis used to apply for criminal charges against the victim, including assault and battery on a police officer, resisting arrest, and disorderly conduct. The prosecutor nol prossed the charges against the victim after watching surveillance footage from four (4) MTBA cameras and concluding that the evidence contradicted what was written in the arrest report.

Civilian complaints were filed against the defendant. The defendant was terminated from the MBTA police and criminal charges were filed. After a bench trial, she was convicted of assault and battery for the OC spray, assault and battery for the baton strikes, and two (2) counts of filing a false police report.

The defendant appealed the conviction on several grounds, including arguments that there was insufficient evidence presented to prove that she used unreasonable and unnecessary force and that she knowingly filed a false police report.

Discussion

The defendant does not deny using OC spray and her baton against the victim.

> "At trial, the defendant argued that her use of force was justified by the police privilege, which permits police officers to use reasonable and necessary force when carrying out their official duties. The Commonwealth bears the burden of proving that the defendant acted without justification, and accordingly, was required to prove beyond a reasonable doubt that the defendant's use of force was not justified by this privilege." (citations omitted) p. 143.

An officer is permitted to use reasonable and necessary force in carrying out their duties. "The question whether an officer's use of force is reasonable or necessary is one to be decided by the fact finder considering all of the surrounding circumstances." p. 146. In this case, the court had the surveillance video, the 911 recording, and testimony from Officers Trinh and Curry, the victim, the defendant and an independent eye-witness on which to determine the facts of the case.

Assault and battery – OC spray

The court heard testimony from both Officer Trinh and Officer Curry that the victim had not interfered with the officers' ability to access the passenger, which they testified was the primary focus of their attention. Officer Trinh, the victim and a third-party witness testified that the victim did not hit, bump or initiate physical contact with the defendant before the OC spray was deployed. Officer Curry also testified that the MBTA use of force policy only allows OC spray to be used on an actively resistant individual and that,

"at no point was [the victim] engaged in active resistance sufficient to warrant the deployment of OC spray." p. 146.

> "All of this evidence, and the rational inferences drawn therefrom, viewed in the light most favorable to the Commonwealth was more than sufficient for the judge to reasonably find that the defendant's use of the OC spray was unreasonable and unnecessary under the circumstances." p. 147.

Assault and battery - use of baton

A suspect may not legally resist an arrest with force, even if the arrest is unlawful, as long as the officer does not use excessive or unnecessary force.

> "However, where an officer does in fact use unreasonable or excessive force, a person is privileged to use such force as reasonably appears to be necessary." p. 148.

The defendant argues that the use of the baton on the victim was reasonable and necessary because the victim was resisting arrest by flailing her arms and striking officers. The problem with this argument is that the victim was not resisting any arrest when the OC spray was deployed.

> "For a person to be resisting arrest, it must be objectively reasonable to that person that he or she is under arrest." p. 148.

In this case, the victim was not told she was under arrest, she was not handcuffed, she was not told to put her hands behind her back, nor had she committed a crime before she was sprayed by OC spray that would have put her on notice that she was going to be arrested. The victim was told that if she did not back up, she was going to be sprayed or arrested. At that point, the victim complied with the order. She backed up and stood where other people were allowed to stand. Despite her compliance with the order, the victim was sprayed.

The court found that, even if the victim was on notice that she was being arrested, the defendant's use of the OC spray was unreasonable and unnecessary so the victim had a right to defend herself with reasonable force. The victim flailed and swung her arms after being sprayed, striking officers in the process. Officer Trinh described the strike he received as "insignificant."

> "There was sufficient evidence to show that [the victim's] use of force, the flailing and swinging of her arms, was in fact a reasonable reaction to being pepper sprayed." p. 148.

> "Where the defendant initiated the encounter with [the victim] by using unreasonable and unnecessary force, and [the victim] responded to this unjustified force with reasonable force, a rational judge could certainly conclude that the

defendant's subsequent use of force –several baton strikes—was unreasonable and unnecessary, and therefore not justified by the police privilege." p. 149.

Filing a false report by a public employee

"To support a false police report conviction, the evidence must establish that the defendant, acting as a police officer in the course of [her] official duties, filed a false written report 'knowing same to be false in a material matter.'" p. 149 *quoting* Commonwealth v. Cohen, 456 Mass. 94, 125 (2010).

In her report, the defendant wrote that the witness tried to wedge herself between the officers and the passenger, that she hindered the officers as they tried to assist the passenger, and that the victim "physically 'bumped' the defendant several times." p. 149. Not only were these statements contradicted at trial by the testimony of other officers, but the statements were also not supported by the surveillance video played at the trial. The defendant's statements in the report were material in that they went directly to the issue of whether the defendant was justified in spraying the victim with OC spray.

The convictions were affirmed.

SUFFICIENCY OF THE EVIDENCE

OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR (MGL c 272 §16)

SHOCK OR ALARM OF INVESTIGATING POLICE OFFICER CAN SATISFY ELEMENTS OF OPEN AND GROSS LEWDNESS AND LASCIVIOUS BEHAVIOR

Commonwealth v. Pasquarelli, 98 Mass.App.Ct. 816 (2020).

Facts

Salem police had received reports of a male "flashing" females. As part of an undercover operation to address the issue, a female officer in plain clothes (UC) was stationed in downtown Salem. While in the area, UC saw a vehicle that matched the perpetrator's vehicle driving in a loop around the area. When the vehicle parked, UC exited her car and started walking up and down the street. The driver got back in his car and then proceeded to drive past UC twenty-five (25) times over the next hour. During that time, the driver also parked the car and walked by UC a couple of times and was also seen poking his head around a building.

UC was stopped at a well-lit intersection talking to other officers on her cell phone when she was approached by the driver. The driver said, "excuse me" and then lifted his sweatshirt exposing his genitals asking UC if she would put it in her mouth. UC saw the defendant's penis and testicles. She said he was "completely exposed." UC screamed to other officers, "[h]e just did it, he just did it, he just exposed himself." p. 817.

The defendant was arrested and charged with open and gross lewdness and lascivious behavior (MGL c 272 § 16). A surveillance officer testified at trial that UC's tone during that call was "fearful, shocked" and "surprised". UC testified that the defendant's actions "made her feel 'shocked' and 'extremely uneasy.'" p. 817.

Discussion

There are five (5) elements to the crime of open and gross lewdness and lascivious behavior.

> (1) that the defendant exposed their genitals, breasts or buttocks;
> (2) they did so intentionally;
> (3) they did so openly or with reckless disregard of public exposure;
> (4) they did so in a manner 'as to produce alarm or shock'; and
> (5) they actually shocked or alarmed one or more persons.

The only issue on appeal is the fourth element. In Commonwealth v. Maguire, 476 Mass. 156 (2017) the SJC clarified that the "shock" or "alarm" of the victim must be an "objectively reasonable reaction in the circumstances of the conduct." p. 818. The defendant in this case argues that the shock or alarm was not objectively reasonable because the conduct in question was the specific conduct the officer was investigating and looking for.

> "The sole issue on appeal is whether - - as a matter of law - - it is objectively unreasonable for a police officer to be 'shocked' or 'alarmed' by exposure to the specific conduct that the officer sought to uncover in the investigation." p. 816.

An officer's "shock" or "alarm" on behalf of community members is not enough. In Commonwealth v. Maguire, 476 Mass. 156 (2017), the officer testified that he was "disgusted", not personally, but out of concern for women in the immediate area. This was not enough to satisfy the fifth element. Maguire did not address the question of whether the officer's "shock" or "alarm" in that case were objectively reasonable.

> "An officer is not immune - - either by nature of her position or by nature of the investigation she is conducting - - to feelings of fright. We would not tell an officer responding to a report of an armed suspect that feelings of fear on being confronted with a gun are unreasonable. Nor would we dismiss the shock an officer may experience on arriving at a bloody murder scene. We likewise decline to conclude that as a matter of law an officer's shock or alarm when accosted by a suspect engaging in lewd behavior, even if anticipated, are objectively unreasonable. The question whether an officer's shock or alarm was objectively reasonable is a question best left for the fact finder." (citations omitted) p. 820.

The court found that the facts of this case were sufficient for a jury to find the officer's "shock" was an objectively reasonable reaction to the defendant's conduct. The conviction was affirmed.

MISLEADING A POLICE OFFICER (MGL c. 268 §13B)

DEFENDANT PROVIDING A FALSE ADDRESS WAS NOT ENOUGH TO PROVE MISLEADING A POLICE OFFICER

Commonwealth v Condon, 99 Mass.App.Ct. 27 (2020).

Facts:
At midnight on January 24, 2017, the defendant invited his 19-year-old ex-girlfriend/victim to "hang out" with him and his friend. The victim agreed and went to the friend's studio apartment. The three (3) started playing a card game in which the loser of each round had to drink alcohol. The victim was drinking vodka she brought with her and was also provided with a shot of liquor that was infused with marijuana leaves. At some point the rules of the game changed requiring the loser to take off a piece of clothing. The victim took pictures of the two (2) men when they were partially clothed and sent the pictures to a friend via Snapchat.

At 2AM the victim rushed to the bathroom and vomited. The defendant followed her to the bathroom, which may have been at the victim's request because she was not able to walk. The defendant told the victim that he wanted to renew their relationship. The next thing the victim remembers is waking up on a sofa with the defendant's penis inside her vagina. The victim told him to stop and unsuccessfully tried to push him away. After a minute or two she lost consciousness again. When she woke up in the morning, the friend drove the defendant and the victim to their respective houses. During the course of the day, the victim exchanged text messages with the same friend that she had sent the pictures to the night before. In these text messages she disclosed the rape.

On the same day of the incident, the victim was interviewed by the police and had a rape kit completed at a local hospital. In the week that followed, police interviewed various witnesses and confirmed the location of the apartment where the rape occurred. The police were not able to physically locate the defendant at that time.

On January 31, 2017, the police called the defendant using a phone number provided by the victim. The defendant answered the phone and identified himself, even providing the last four (4) digits of his social security number. The defendant denied the incident and made various specific denials including denying seeing the victim recently. At the end of the call, the detective asked the defendant for his address. The defendant questioned why police wanted the information but ultimately provided an address. The detective looked up the address on Google maps and then checked town tax records and drove by the address confirming that no such residence existed. On February 3, 2017, the detective looked for the defendant at various locations, spoke to his father, his employer, and his current girlfriend but was unable to locate him. The next day the detective sought an arrest warrant for the defendant.

The defendant was indicted and convicted of rape and misleading a police officer. The defendant appealed the rape conviction arguing that the trial court erred when it did not

allow certain text messages between the victim and her friend into evidence. The SJC upheld the rape conviction. The defendant also appealed the misleading a police officer charge arguing that there was insufficient evidence to convict.

Discussion

Simply lying to the police is not enough to prove a violation of MGL c 268 §13B. For purposes of proving misleading a police officer within the meaning of the statute, the question is whether the false information "reasonably could lead investigators to pursue a course of investigation materially different from the course they otherwise would have pursued." p. 39 *quoting* Commonwealth v. Paquette, 475 Mass. 793, 801 (2016).

The misleading a police officer offense charged in this case was based on the defendant's providing a false address to the detective. By the time the defendant had provided the false address to the detective in this case, the police had already conducted an extensive investigation and had sufficient information to charge the defendant with the rape. In addition, the false information was provided after police officers had tried and failed to physically locate the defendant and at the end of the telephone interview of the defendant.

> "There is no evidence that the defendant's lying about where he lived led the police to investigate, or even think about the case in a materially different manner, with the possible exception that they could have viewed his lies as evidence of consciousness of guilt." p. 39.

The court also found that there was no evidence that the false information,

> "delayed or impeded his arrest or arraignment. In our view, under the circumstances of this case, the defendant's giving the police a fake address did not, and could not, 'have led police to pursue a materially different course of investigation.'" p. 39 *quoting* Paquette.

In summary, the court stated,

> "the jury readily could have concluded that the defendant deliberately gave the police a false address in order to make it more difficult for them to locate him. Moreover, there was uncontested evidence that [the detective] wasted some amount of effort as a result of the defendant's false statement. Nevertheless, we conclude that the evidence was insufficient to establish that the defendant misled police within the meaning of G.L. c. 268, §13B." p. 38.

The verdict on the misleading a police officer was overturned.

CHILD ABANDONMENT (MGL c 273 § 1)

CHILD IN FOSTER CARE WHEN PARENTS LEAVE THE COUNTRY NOT ABANDONED FOR PURPOSES OF CRIMINAL STATUTE

Commonwealth v. Ricardi, 99 Mass.App.Ct. 496 (2021).

Facts

In 2019, Chicopee police began investigating potential sexual exploitation involving the sixteen-year old daughter of the defendant. The Department of Children and Families and the local police scheduled a multidisciplinary team forensic interview of the child. An investigator called the girl's parents asking for written consent to interview the daughter. The defendant, the mother of the girl, agreed to meet with the detective on January 10, 2019 to sign the form consenting to the interview. After the defendant failed to appear for the meeting, officers tried to locate her. They found the home had been abandoned, even finding the defendant's work keys with a note to return them to her employer. Officers learned that the defendant had called out sick from work that day and her other two (2) children were not in school. Eventually investigators learned that the parents and the other children had crossed over the Canadian border on January 10, 2019.

The defendant was charged with abandoning a child without support in violation of MGL c 273 § 1. The defendant filed a motion to dismiss arguing that the application for complaint failed to establish probable cause for the charge.

Discussion

> "General laws c 273 § 1 provides in relevant part that a parent shall be guilty of a felony if (1) she abandons her minor child without making reasonable provisions for the child's support, or (2) she leaves the Commonwealth and goes into another State without making reasonable provisions for the support of her minor child."
>
> "Although not defined in G.L. c. 273 § 1, we have held that 'criminal child abandonment means the child was left without making reasonable provisions for support.'"

When deciding a motion to dismiss for lack of probable cause, the court makes its decision based upon the four (4) corners of the complaint. That means the court looks at the complaint and any documents that were submitted to the clerk magistrate in support of the application for complaint. The court reviews the information and determines whether there was probable cause to issue the complaint. "Probable cause 'exists where the facts and circumstances ... [are] sufficient in themselves to warrant a [person] of reasonable caution in the belief that an offense has been ... committed'" (quotation and citation omitted) *quoting* Commonwealth v. Coggeshall, 473 Mass. 665, 667 (2016).

The court found that the police report that was attached to the application for complaint contained contradictory information as to the daughter's legal status as of January 10, 2019. According to the timeline in the report, on January 7, 2019 the police had told the father that the daughter had "turned herself in and was placed in foster care." The timeline also states that police took emergency custody of the daughter on January 10, 2019 when they discovered that the home had been abandoned. The court also noted that, "[t]he application itself states at various points that Susan was in a foster home, that she was in foster care, and that the department had taken emergency custody of her."

> "In common terms, foster care describes a situation in where a child lives with and is cared for by people who are not the child's parents for a period of time, usually with the approval of a government agency."

The court found that the application supported an inference that the daughter was in foster care by the time the defendant left the Commonwealth. Based upon these facts, the court found that the application did not show that the daughter had been abandoned.

NOTE: This case was decided on April 16, 2021. The District Attorney's office may be seeking further review of this case.

POSSESSION OF A LOADED FIREARM (MGL c 269§ 10(n))

FIREARM FOUND IN THE CAR WITH THE DEFENDANT, WITHOUT MORE, INSUFFICIENT TO PROVE DEFENDANT KNEW IT WAS LOADED

Commonwealth v. Ashford, 486 Mass. 450 (2020).

Facts

Shortly after 9PM, the defendant pulled out of a gas station in Brockton. A State trooper began to follow the car and attempted to pull the car over after observing it driving 35 MPH in a 30 MPH zone. After the blue lights were activated, the defendant sped up and a pursuit began. When another police vehicle joined the chase, the defendant parked the car and fled on foot. Troopers then pursued the defendant on foot until they caught up to him. When he finally stopped, the defendant had his hands in his pockets and was ordered to take his hands out of his pockets. When he did so, he "motioned" toward a nearby dumpster. The defendant was placed under arrest and charged with possession with intent to distribute cocaine that troopers found in the dumpster.

A trooper searched the defendant's car. They found a plastic bag on the rear seat that contained a loaded pistol, a scale, and a bottle of "Very Sexy" cologne. The defendant was read his Miranda rights on the drive back to the State police barracks. The defendant was asked what kind of cologne he was wearing and he said, "Very Sexy." He also admitted that the cologne, drugs, and scale were his, but denied knowledge of the gun. The defendant said he ran from officers because of the drugs.

The defendant was convicted of unlawful possession of a firearm (MGL c 269 §10(a)), unlawful possession of a loaded firearm (MGL c 269 §10(n)), and possession with intent to distribute cocaine (MGL c 94C § 32A(c). The defendant appeals the possession of a loaded firearm conviction arguing that the Commonwealth did not prove that he knew that the gun was loaded.

Discussion

In 2018 the SJC rendered its decision in Commonwealth v. Brown, 479 Mass. 600 (2018), which found that, "in order for a defendant to be convicted of possessing a loaded firearm under G.L. 269, §10(n), the Commonwealth must prove that the defendant knew the weapon was loaded." p. 453. The defendant's knowledge can be proved by circumstantial evidence and the reasonable inferences that flow from that evidence. Such inferences, "need only be reasonable and possible, not necessary and inescapable." pp. 454-455.

The court briefly discussed other cases that looked at what circumstantial evidence would be enough to prove an individual knew that a gun was loaded.

> In Brown, the court found that the evidence was insufficient where the gun was not found on the defendant's person and one could not tell just by looking at the gun whether it was loaded.
>
> Commonwealth v. Cooper, 97 Mass.App.Ct. 772 (2020) (evidence of knowledge was sufficient where "gun was neither holstered, nor concealed, but was drawn" and tucked into defendant's armpit area, and there also was evidence defendant deliberately had obtained weapon).
>
> Commonwealth v. Grayson, 96 Mass.App.Ct. 748 (2019) ("reasonable inference that a person carrying a firearm in his [or her] waistband would know whether it was loaded" supports inference of knowledge, but, standing alone, is insufficient to establish knowledge).
>
> Commonwealth v. Resende, 94 Mass.App.Ct. 194 (2018) ("close case" where "commonsense inference ... that a person would check to see if the firearm was loaded before putting it in his [or her] waistband" plus threats related to using firearm were deemed sufficient evidence of knowledge).
>
> Commonwealth v. Galarza, 93 Mass.App.Ct. 740 (2018) (evidence of knowledge was insufficient where gun was found in console of truck driven by defendant but owned by third party).

In this case, the gun was found in a vehicle and not on the defendant's person, he denied ownership of the weapon, he had not threatened to use the gun and was not seen handling the gun. Based upon the facts of this case, there was insufficient evidence to infer the defendant knew that that the gun was loaded. The conviction was overturned.

NOTE: It did not matter that the Brown decision came down eight (8) years after the defendant's arrest in this case. If a case is on appeal and there is a question raised involving the interpretation of a statute, the court usually will consider any caselaw that exists at the time the court is reviewing the case relating to the interpretation of the statute.

ARMED HOME INVASION (MGL c 265 § 18C)

INSUFFICIENT EVIDENCE TO SUPPORT CONVICTION OF ARMED HOME INVASION WHERE DEFENDANT ARMED HIMSELF AFTER ENTERING THE ATTACHED GARAGE OF THE HOME

Commonwealth v. Tinsley, 487 Mass. 380 (2021).

Facts

A husband and wife and their high-school aged son were asleep in their home in the early morning hours of August 30, 2005. The wife was awakened by a noise outside her bedroom door. The wife opened the door to find a man wearing a hat and a mask that concealed his face. The man, later identified as the defendant, grabbed the wife and held an object believed to be a screwdriver against her neck. The wife screamed, which woke up her husband and her son. The defendant demanded money from the wife. He took her into the bathroom where she gave him $49.00. The defendant then brought her back into the bedroom where he shoved her down onto the bed.

When the husband got up to help his wife, he was attacked by a second intruder. He was struck in the head with a bat or a club that broke upon impact. The husband was held down, strangled and told to "shut up." During the struggle with the co-defendant, the husband's head split open when he fell and struck his head on a bureau. The co-defendant also stabbed the husband's hand with the jagged end of the broken club, severing his tendons and nerves.

The co-defendant fled the room and was chased by the husband and the son. The son, who had armed himself with a knife, caught the co-defendant in the kitchen and stabbed the intruder in the torso. The father and son struggled with the co-defendant who was able to take the knife away from the son, threatened the family, and then ran from the house via a door in the kitchen that led to the attached garage. The wife and son both suffered injuries requiring stitches. The husband's head wounds required staples, his hand required stitches, and his nose was broken.

There was no obvious sign of forced entry into the home. The attached garage had windows, an exterior door, and the interior door that led to the kitchen. The exterior garage door is usually unlocked; however, the suspects appeared to have tried to gain entrance through a window by dragging a chair up to it and removing the window screen. The interior door was locked; but the son had left his keychain, with his house key on it, in the truck that was parked in the garage. This keychain was later found in the grass outside the home.

Officers found a screwdriver lying on the floor of the garage under one of the parked vehicles. The wife testified that the toolbox where the family keeps screwdrivers is kept in the garage. She also testified that the screwdriver found on the ground was bigger than the one that was held against her neck by the defendant. No smaller screwdrivers were found on scene. At trial, the Commonwealth argued that the intruders had entered the garage, rummaged through the toolbox and the defendant took a screwdriver as a weapon.

The investigation led to the defendant the next day when the police were dispatched to his home after the co-defendant called for medical attention for stab wounds he had suffered. DNA from evidence found on scene linked both the defendant and the co-defendant to the crime.

The defendant was convicted of armed home invasion, armed burglary, armed robbery while masked, assault and battery by means of a dangerous weapon, and assault and battery. The defendant now argues that the Commonwealth had not proved the elements of the armed home invasion charge beyond a reasonable doubt.

Discussion

Armed home invasion, MGL c 265 § 18C has four elements:

> (1) A knowing entry into or remaining in another's dwelling;
> (2) with the knowledge that at least one person is present in the dwelling;
> (3) while being armed with a dangerous weapon; and
> (4) the use or imminent threat of force against someone in the dwelling or causing an injury.

The only dispute in this case is the third element. The question is whether the defendant "enter[ed] the dwelling place of another…while armed with a dangerous weapon." MGL c 265 § 18C. In Commonwealth v. Ruiz, 426 Mass. 391, 392-393 (1998), the court held that the Commonwealth is required to prove that, "the defendant was armed with a dangerous weapon at the time of entry." (emphasis added.) Armed burglary, by contrast, applies to individuals who are either armed at the time of entry into a dwelling house or arm themselves while inside the house.

The evidence in this case is that the defendant entered the garage, armed himself with a screwdriver there, and then entered the kitchen. The question then becomes whether the attached garage is part of the "dwelling house."

The courts have "construed broadly" the term "dwelling house" when interpreting the burglary statutes.

> "Indeed, at common law, 'every house for the dwelling and habitation of man' was taken to include not only the dwelling house proper, 'but also the outhouses, such as barns, stables, cow-houses, dairyhouses, and the like, if they be parcel of the messuage, though they be not under the same roof, or joining contiguous to it.'" p. 387 *quoting* Devoe v. Commonwealth, 3 Met. 316 (325 (1841).

The court found that the defendant's entry into the attached garage in this case constituted entry into the "dwelling place of another."

The court was not persuaded by the Commonwealth's argument that the defendant's passage from the garage into the kitchen constituted a separate entry into the dwelling. Such an interpretation of the statute,

> "would allow a defendant's crossing into any, 'room, closet, or ancillary space' inside a single house to be considered a separate entry that could support a conviction of armed home invasion." p. 388.

The court found that such an outcome defies common sense.

"Here, because there was no evidence that the defendant armed himself with a weapon before he entered the [family's] home, he cannot be convicted of armed home invasion." p. 389. The court vacated the armed home invasion conviction and remanded the case for resentencing on the other charges.

DISSEMINATION OF CHILD PORNOGRAPHY (MGL 272 §29B)

SENDING PORNOGROPHIC PICTURES TO THE SUBJECT OF THE PHOTOS IS ENOUGH TO PROVE THE ELEMENT OF DISSEMINATION

Commonwealth v. Ubeda, 99 Mass.App.Ct. 587 (2021).

Facts

Karen, a 15-year-old girl was contacted by someone calling themselves "Crystal" on Facebook about a lucrative modeling opportunity. Upon Crystal's request, Karen sent photos, including nude pictures, to Crystal. She was then contacted by a man who set up a meeting. Karen went to that meeting and was sexually assaulted by a man, later identified as the defendant.

After the assault, the defendant told Karen he was going to post the nude pictures because she "hadn't done anything he wanted [her] to do." In the following days she received text messages from an unfamiliar number. The text messages included, among other things, two (2) collages of photos. Some of the photos were ones that Karen had sent to Crystal and others were taken at the time of the assault. The photos showed Karen in a state of nudity and some were pornographic.

During the investigation, the defendant was identified as a person of interest and was interviewed by the police. The defendant confirmed that the cell phone number that sent the texts to Karen was his phone number.

The defendant was indicted on numerous charges stemming from actions committed against both Karen and another adult woman. Among those charges was a charge of disseminating child pornography for the photos that were texted to Karen. The defendant appealed that conviction arguing that the Commonwealth did not meet its burden on proof as to two (2) elements of the offense – dissemination and lascivious intent.

Discussion

Dissemination

There was sufficient evidence before the jury to find that the defendant created the collages of nude photographs and sent them to Karen. The defendant argued that dissemination requires the distribution to a larger audience or, at the very least, to someone other than the person in the pictures.

MGL c 272 § 31 defines "disseminate" as "to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display." The plain language of the statute does not support the defendant's interpretation of the statute. Sending texts to Karen that contain pornographic pictures, even though the pictures were of Karen, constitutes dissemination.

The defendant also argued that Karen was a willing participant and modeled for the pictures. The court pointed out that not only was this not a reasonable interpretation of the evidence, but that MGL c 272 §29B(d) specifically states that a minor is incapable of consenting to any criminal conduct of a defendant in violation of c 272.

Lascivious intent

Lascivious intent is defined by MGL c 272 § 31 as "a state of mind in which the sexual gratification or arousal of any person is an objective."

> "Given the graphic sexual nature of the photographs in this case, which included photographs of Karen engaging in masturbation and lewd exhibition of the genitals, the jury could have found that 'the defendant had his own sexual gratification as an objective' in creating and sending the collages of Karen."

It did not matter that the defendant could also have intended to blackmail or embarrass Karen. "So long as there is proof that sexual gratification or arousal is "an objective," the element of lascivious intent is satisfied."

POLICE REFORM

With the approval of the Governor, "An Act relative to justice, equity and accountability in law enforcement in the Commonwealth" on December 31, 2020, commonly referred to as "police reform," the Commonwealth took a major step forward in establishing uniform training standards and accountability for all law enforcement officers in the Commonwealth. The legislation was extensive. In addition to creating multiple commissions, mandating certain studies be conducted, and detailing training requirements for law enforcement officers, the legislation also created new criminal statutes and other important changes to the law that affect law enforcement officers. The purpose of this section of the legal update is to advise officers of the new criminal statutes and other changes to the law that will impact the performance of their law enforcement duties.

MASSACHUSETTS PEACE OFFICERS STANDARDS AND TRAINING COMMISSION

Police reform added a new chapter, MGL c 6E effective July 1, 2021. This chapter created the Massachusetts Peace Officers Standards and Training Commission ("POSTC"). MGL c 6E covers a wide array of topics, including who will comprise the commission, the purpose and responsibilities of POSTC, certain training requirements, and details on how POSTC will work.

Divisions within POSTC
There will be two (2) divisions within POSTC.

The division of police certification. "The purpose of the division of police certification shall be to establish uniform policies and standards for the certification of all law enforcement officers."

The division of police standards. "The purpose of the division of police standards shall be to investigate officer misconduct and make disciplinary recommendations to the commission."

DEFINITIONS

MGL c 6E § 1 defines several terms, including:

Officer-involved injury or death - any event during which an officer:

(i) discharges a firearm, as defined in section 121 of chapter 140, actually or proximately causing injury or death to another;
(ii) discharges any stun gun as defined in said section 121 of said chapter 140, actually or proximately causing injury or death to another;

(iii) uses a chokehold, actually or proximately causing injury or death of another;

NOTE: Chokeholds are specifically banned by police reform

(iv) discharges tear gas or other chemical weapon, actually or proximately causing injury or death of another;
(v) discharges rubber pellets from a propulsion device, actually or proximately causing injury or death of another;
(vi) deploys a dog, actually or proximately causing injury or death of another;
(vii) uses deadly force, actually or proximately causing injury or death of another;
(viii) fails to intervene, as required by section 15, to prevent the use of excessive or prohibited force by another officer who actually or proximately causes injury or death of another; or
(ix) engages in a physical altercation with a person who sustains serious bodily injury or requests or receives medical care as a result.

Untruthful or untruthfulness - knowingly making an untruthful statement concerning a material fact or knowingly omitting a material fact:

(i) on an official criminal justice record, including, but not limited to, a police report;
(ii) while testifying under oath;
(iii) to the POSTC or its employee(s); or
(iv) during an internal affairs investigation, administrative investigation or disciplinary process.

USE OF FORCE AND DE-ESCALATION

USE OF FORCE

MGL c 6E § 14 (a) (effective December 1, 2021) provides:

A law enforcement officer shall not use physical force upon another person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to:

(i) effect the lawful arrest or detention of a person;
(ii) prevent the escape from custody of a person; or
(iii) prevent imminent harm and the amount of force used is proportionate to the threat of imminent harm; provided, however, that a law enforcement officer may use necessary, proportionate

and non-deadly force in accordance with the regulations promulgated jointly by POSTC and the MPTC.

"De-escalation tactics" is defined as: proactive actions and approaches used by an officer to stabilize a law enforcement situation so that more time, options and resources are available to gain a person's voluntary compliance and to reduce or eliminate the need to use force including, but not limited to, verbal persuasion, warnings, slowing down the pace of an incident, waiting out a person, creating distance between the officer and a threat and requesting additional resources to resolve the incident, including, but not limited to, calling in medical or licensed mental health professionals, as defined in subsection (a) of section 51½ of chapter 111, to address a potential medical or mental health crisis.

NOTE: The legislation requires all use of force regulations be promulgated by September 1, 2021.

USE OF DEADLY FORCE

MGL c 6E § 14(b) (effective July 1, 2021) provides:

A law enforcement officer shall not use deadly force upon a person unless de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances and such force is necessary to prevent imminent harm to a person and the amount of force used is proportionate to the threat of imminent harm.

"Deadly force" is defined as: "physical force that can reasonably be expected to cause death or serious physical injury."

NOTE: "non-deadly force" is not defined by the legislation.

PROHIBITION OF CHOKEHOLD

MGL c 6E § 14(c) (effective July 1, 2021) provides:

"A law enforcement officer shall not use a chokehold."

A "chokehold" is defined as: the use of a lateral vascular neck restraint, carotid restraint or other action that involves the placement of any part of law enforcement officer's body on or around a person's neck in a manner that limits the person's breathing or blood flow with the intent of or with the result of causing bodily injury, unconsciousness or death.

DISCHARGE OF FIREARM INTO FLEEING MOTOR VEHICLE

MGL c 6E § 14 (d) (effective July 1, 2021) provides:

> A law enforcement officer shall not discharge any firearm into or at a fleeing motor vehicle unless, based on the totality of the circumstances, such discharge is necessary to prevent imminent harm to a person and the discharge is proportionate to the threat of imminent harm to a person.

DUTY TO INTERVENE

MGL c 6E § 15 (effective July 1, 2021) provides:

> (a) An officer present and observing another officer using physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances, **shall intervene** to prevent the use of unreasonable force unless intervening would result in imminent harm to the officer or another identifiable individual.
>
> (b) An officer who observes another officer using physical force, including deadly force, beyond that which is necessary or objectively reasonable based on the totality of the circumstances **shall report the incident** to an appropriate supervisor as soon as reasonably possible but not later than the end of the officer's shift. The officer shall prepare a detailed written statement describing the incident consistent with uniform protocols. The officer's written statement shall be included in the supervisor's report.
>
> (c) A law enforcement agency shall develop and implement a policy and procedure for law enforcement personnel to report abuse by other law enforcement personnel without fear of retaliation or actual retaliation.

MASS DEMONSTRATIONS

MGL 6E § 14(e) (effective July 1, 2021) provides:

> When a police department has advance knowledge of a planned mass demonstration, it shall attempt in good faith to communicate with organizers of the event to discuss logistical plans, strategies to avoid conflict and potential communication needs between police and event participants. The department shall make plans to avoid and de-escalate potential conflicts and designate an officer in charge of de-escalation planning and communication about the plans within the department.

A law enforcement officer shall not discharge or order the discharge of tear gas or any other chemical weapon, discharge or order the discharge of rubber pellets from a propulsion device or release or order the release of a dog to control or influence a person's behavior unless:

(i) de-escalation tactics have been attempted and failed or are not feasible based on the totality of the circumstances; and

(ii) the measures used are necessary to prevent imminent harm and the foreseeable harm inflicted by the tear gas or other chemical weapon, rubber pellets or dog is proportionate to the threat of imminent harm.

If a law enforcement officer utilizes or orders the use of tear gas or any other chemical weapon, rubber pellets or a dog against a crowd, the law enforcement officer's appointing agency shall file a report with POSTC detailing all measures that were taken in advance of the event to reduce the probability of disorder and all de-escalation tactics and other measures that were taken at the time of the event to de-escalate tensions and avoid the necessity of using the tear gas or other chemical weapon, rubber pellets or dog.

USE OF FACIAL RECOGNITION BY LAW ENFORCEMENT

The police reform legislation created a new section in chapter 6 regarding facial recognition that is effective July 1, 2021. MGL c 6 § 220 defines certain terms, including:

"Facial recognition", an automated or semi-automated process that assists in identifying or verifying an individual or capturing information about an individual based on the physical characteristics of an individual's face, head or body, that uses characteristics of an individual's face, head or body to infer emotion, associations, activities or the location of an individual; provided, however, that "facial recognition" shall not include the use of search terms to sort images in a database.

"Facial recognition search", a computer search using facial recognition to attempt to identify an unidentified person by comparing an image containing the face of the unidentified person to a set of images of identified persons; provided, however, that a set of images shall not include moving images or video data.

"Other remote biometric recognition", an automated or semi-automated process that assists in identifying or verifying an individual or capturing information about an individual based on an individual's gait, voice or other biometric characteristic or that uses such characteristics to infer emotion, associations, activities or the location of an individual; provided, however, that "other remote biometric recognition" shall not

include the identification or verification of an" individual using deoxyribonucleic acid, fingerprints, palm prints or other information derived from physical contact.

Subsection (b) provides as follows:

> Any law enforcement agency performing or requesting a facial recognition search using facial recognition technology shall only do so through a written request submitted to the registrar of motor vehicles, the department of state police or the Federal Bureau of Investigation.
>
> A law enforcement agency may perform such a facial recognition search for the following purposes:
>
> (i) to execute an order, issued by a court or justice authorized to issue warrants in criminal cases, based upon specific and articulable facts and reasonable inferences therefrom that provide reasonable grounds to believe that the information sought would be relevant and material to an ongoing criminal investigation or to mitigate a substantial risk of harm to any individual or group of people; or
>
> (ii) without an order to identify a deceased person or if the law enforcement agency reasonably believes that an emergency involving substantial risk of harm to any individual or group of people requires the performance of a facial recognition search without delay.
>
> Any emergency request shall be narrowly tailored to address the emergency and shall document the factual basis for believing that an emergency requires the performance of a facial recognition search without delay.
>
> This subsection shall not apply to the department of state police when performing investigatory functions related to the issuance of identification documents by the registrar of motor vehicles.

Subsection (c) requires all law enforcement agencies to document each facial recognition search performed and to provide that documentation quarterly to the executive office of public safety and security.

Subsection (e) provides:

> Notwithstanding subsection (b), a law enforcement agency may:
>
> (i) acquire and possess personal electronic devices, such as a cell phone or tablet, that utilizes facial recognition technology for the sole purpose of user authentication;
>
> (ii) acquire, possess and use automated video or image redaction software; provided, that such software does not have the capability

of performing facial recognition or other remote biometric recognition; and

(iii) receive evidence related to the investigation of a crime derived from a biometric surveillance system; provided, that the use of a biometric surveillance system was not knowingly solicited by or obtained with the assistance of a public agency or any public official in violation of said subsection (b).

NOTE: the legislation also established a special legislative commission to study governmental use of facial recognition technology in the commonwealth. The commission is required to report their findings and recommendations, including proposed legislation, by December 31, 2021.

BIAS FREE POLICING

"Bias-free policing" is defined by MGL c 6E § 1 as:

> policing decisions made by and conduct of law enforcement officers that shall not consider a person's race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level.
>
> This definition shall include policing decisions made by or conduct of law enforcement officers that:
>
> (1) are based on a law enforcement purpose or reason which is non-discriminatory, or which justifies different treatment; or
> (2) consider a person's race, ethnicity, sex, gender identity, sexual orientation, religion, mental or physical disability, immigration status or socioeconomic or professional level because such factors are an element of a crime.

AMENDMENT TO CIVIL RIGHT LAW

The civil rights law, MGL c 12 § 11H, was amended by adding language in subsection (2)(b). The statute effective as of July 1, 2021 reads:

> (a)(1) Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(2) If the attorney general prevails in an action under this section, the attorney general shall be entitled to:

(i) an award of compensatory damages for any aggrieved person or entity; and

(ii) litigation costs and reasonable attorneys' fees in an amount to be determined by the court.

In a matter involving the interference or attempted interference with any right protected by the constitution of the United States or of the commonwealth, the court may also award civil penalties against each defendant in an amount not exceeding $5,000 for each violation.

(b) All persons shall have the right to bias-free professional policing. Any conduct taken in relation to an aggrieved person by a law enforcement officer acting under color of law that results in the decertification of said law enforcement officer by POSTC shall constitute interference with said person's right to bias-free professional policing and shall be a prima facie violation of said person's right to bias-free professional policing and a prima facie violation of subsection (a).

No law enforcement officer shall be immune from civil liability for any conduct under color of law that violates a person's right to bias-free professional policing if said conduct results in the law enforcement officer's decertification; provided, however, that nothing in this subsection shall be construed to grant immunity from civil liability to a law enforcement officer for interference by threat, intimidation or coercion, or attempted interference by threats, intimidation or coercion, with the exercise or enjoyment any right secured by the constitution or laws of the United States or the constitution or laws of the commonwealth if the conduct of said officer was knowingly unlawful or was not objectively reasonable.

PROHIBITION OF RACIAL PROFILING BY LAW ENFORCEMENT AGENCIES

MGL c 90 § 63 was amended (effective December 31, 2020) by inserting the following subsection:

(h) A law enforcement agency shall not engage in racial or other profiling. The attorney general may bring a civil action in the superior court for injunctive or other equitable relief to enforce this subsection.

For the purposes of this subsection, "racial or other profiling" shall mean differential treatment by a law enforcement officer based on actual or perceived race, color, ethnicity, national origin, immigration or citizenship status, religion, gender, gender identity or sexual orientation in conducting a law enforcement action, whether intentional or evidenced by statistically-significant data showing disparate treatment; provided,

however, that "racial or other profiling" shall not include the use of such characteristics, in combination with other factors, to apprehend a specific suspect based on a description that is individualized, timely and reliable.

NO-KNOCK WARRANTS

MGL c 276 § 2D (effective as of December 31, 2020) provides:

(a) A warrant that does not require a law enforcement officer to knock and announce their presence and purpose before forcibly entering a residence shall not be issued except by a judge and only if the affidavit supporting the request for the warrant (i) establishes probable cause that if the law enforcement officer announces their presence their life or the lives of others will be endangered; and (ii) includes an attestation that the law enforcement officer filing the affidavit has no reason to believe that minor children or adults over the age of 65 are in the home, unless there is a credible risk of imminent harm to the minor or adult over the age of 65 in the home.

(b) A police officer executing a search warrant shall knock and announce their presence and purpose before forcibly entering a residence unless authorized by a warrant to enter pursuant to subsection (a).

(c) An officer shall not dispense with the requirements of subsections (a) and (b) except to prevent a credible risk of imminent harm.

(d) Evidence seized or obtained during the execution of a warrant shall be inadmissible if a law enforcement officer violates this section.

PROTECTIVE CUSTODY OF PERSONS INCAPACITATED BY ALCOHOL

MGL c 111B § 8 was amended to include the Dukes county sheriff's office in the list of places officers are allowed to bring incapacitated persons. This change went into effect on December 31, 2020. The statute now reads:

> Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station or the Dukes county sheriff's office. To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.
>
> Any person assisted by a police officer to a police station or the Dukes county sheriff's office shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test. Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or the Dukes county sheriff's office or transferred to a facility.

Any person who is administered a breathalyzer test, under this section, shall be presumed not to be intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is five one hundredths or less and shall be released from custody forthwith. If any person who is administered a breathalyzer test, under this section, and evidence from said test indicates that the percentage of alcohol in his blood is more than five one hundredths and is less than ten one hundredths there shall be no presumption made based solely on the breathalyzer test. In such instance a reasonable test of coordination or speech coherency must be administered to determine if said person is intoxicated. Only when such test of coordination or speech coherency indicates said person is intoxicated shall he be placed in protective custody at a police station or the Dukes county sheriff's office or transferred to a facility.

Any person presumed intoxicated and to be held in protective custody at a police station or the Dukes county sheriff's office shall, immediately after such presumption, have the right and be informed of said right to make one phone call at his own expense and on his own behalf. Any person assisted by a police officer to a facility under this section shall have the right to make one phone call at his own expense on his own behalf and shall be informed forthwith upon arriving at the facility of said right. The parent or guardian of any person, under the age of eighteen, to be held in protective custody at a police station or the Dukes county sheriff's office shall be notified forthwith upon his arrival at said station or the Dukes county sheriff's office or as soon as possible thereafter.

If any incapacitated person is assisted to a police station or the Dukes county sheriff's office, the officer in charge or his designee shall notify forthwith the nearest facility that the person is being held in protective custody. If suitable treatment services are available at a facility, the department shall thereupon arrange for the transportation of the person to the facility in accordance with the provisions of section seven.

No person assisted to a police station or the Dukes county sheriff's office pursuant to this section shall be held in protective custody against his will; provided, however, that if suitable treatment at a facility is not available, an incapacitated person may be held in protective custody at a police station or the Dukes county sheriff's office until he is no longer incapacitated or for a period of not longer than twelve hours, whichever is shorter.

A police officer acting in accordance with the provisions of this section may use such force as is reasonably necessary to carry out his authorized responsibilities. If the police officer reasonably believes that his safety or the safety of other persons present so requires, he may search such person and his immediate surroundings, but only to the extent necessary to discover and seize any dangerous weapons which may on that occasion be used against the officer or other person present; provided, however, that if such person is held in protective custody at a police station or the Dukes county sheriff's office all valuables and all articles which may pose a danger to such person or to others may be taken from him for safekeeping and if so taken shall be inventoried.

A person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been arrested or to have been

charged with any crime. An entry of custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the officer in charge, whether the person held in custody exercised his right to make a phone call, whether the person held in custody exercised his right to take a breathalyzer test, and the results of the breathalyzer test if taken, which entry shall not be treated for any purposes, as an arrest or criminal record.

For purposes of this statute, "incapacitated" means: the condition of an intoxicated person who, by reason of the consumption of intoxicating liquor is (1) unconscious, (2) in need of medical attention, (3) likely to suffer or cause physical harm or damage property, or (4) disorderly.

NEW CRIMINAL STATUTES

NOTE: All of the following statutes took effect on December 31, 2020.

False claim of hours worked by law enforcement officer MGL c 231 § 85BB –

(a) A law enforcement officer, as defined in section 1 of chapter 6E, who knowingly submits to a state agency, state authority, city, town or agency, as defined in said section 1 of said chapter 6E, a false or fraudulent claim of hours worked for payment and receives payment therefor or knowingly makes, uses or causes to be made or used a false record or statement material to a false or fraudulent claim of hours worked for payment that results in a law enforcement officer receiving payment therefor or any person who conspires to commit a violation of this section shall be punished by a fine of 3 times the amount of the fraudulent wages paid or by imprisonment for not more than 2 years.

"law enforcement officer" is defined in c 6E § 1 as: any officer of an agency, including the head of the agency; a special state police officer appointed pursuant to section 58 or section 63 of chapter 22C; a special sheriff appointed pursuant to section 4 of chapter 37 performing police duties and functions; a deputy sheriff appointed pursuant to section 3 of said chapter 37 performing police duties and functions; a constable executing an arrest for any reason; or any other special, reserve or intermittent police officer.

Indecent A&B by law enforcement officer MGL c 265 § 13H½.

(a) For the purposes of this section "law enforcement officer" shall mean a police officer, an auxiliary, intermittent, special, part-time or reserve police officer, a police officer in the employ of a public institution of higher education pursuant to section 5 of chapter 15A, a public prosecutor, a municipal or public emergency medical technician, a deputy sheriff, a correction officer, a court officer, a probation officer, a parole officer, an officer of the department of youth services, a constable, a campus police officer who holds authority as a special state police officer or a person impersonating one of the foregoing.

(b) A law enforcement officer who commits an indecent assault and battery on a person who has attained the age of 14 and who is in the custody or control of such law enforcement officer shall be punished by imprisonment in the state prison for not more than 5 years, or by imprisonment for not more than 2½ years in a jail or house of correction.

In a prosecution commenced under this subsection, a person shall be deemed incapable of consent to contact of a sexual nature with a law enforcement officer.

(c) A law enforcement officer who commits an indecent assault and battery on an elder or person with a disability, as defined in section 13K, and who is in the custody or control of such law enforcement officer shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2½ years, and a law enforcement officer who commits a second or subsequent such offense shall be punished by imprisonment in the state prison for not more than 20 years.

In a prosecution commenced under this subsection, a person shall be deemed incapable of consent to contact of a sexual nature with a law enforcement officer.

(d) A law enforcement officer who commits an indecent assault and battery on a person in their custody or control who is known to such law enforcement officer as having an intellectual disability shall for the first offense be punished by imprisonment in the state prison for not less than 5 years or not more than 10 years; and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than 10 years. Except in the case of a conviction for the first offense for violation of this subsection, the imposition or execution of the sentence shall not be suspended, and no probation or parole shall be granted until the minimum imprisonment herein provided for the offense shall have been served.

In a prosecution commenced under this subsection, a person shall be deemed incapable of consent to contact of a sexual nature with a law enforcement officer.

(e) A law enforcement officer who commits an indecent assault and battery on a child under the age of 14 and who is in the custody or control of such law enforcement officer shall be punished by imprisonment in the state prison for not more than 10 years, or by imprisonment in the house of correction for not more than 2 and one-half years. A prosecution commenced under this subsection shall neither be continued without a finding nor placed on file.

In a prosecution commenced under this subsection, a child under the age of 14 shall be deemed incapable of consent to contact of a sexual nature with a law enforcement officer.

Rape by law enforcement officer MGL c 265 § 22(c)

The legislation added subsection (c) to the rape statute. The statute now reads:

a) Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission of an offense defined in section fifteen A, fifteen B, seventeen, nineteen or twenty-six of this chapter, section fourteen, fifteen, sixteen, seventeen or eighteen of chapter two hundred and sixty-six or section ten of chapter two hundred and sixty-nine shall be punished by imprisonment in the state prison for life or for any term of years.

   No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

b) Whoever has sexual intercourse or unnatural sexual intercourse with a person and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for not more than twenty years; and whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term or years.

   Whoever commits any offense described in this section while being armed with a firearm, rifle, shotgun, machine-gun or assault weapon, shall be punished by imprisonment in the state prison for not less than ten years.

   Whoever commits a second or subsequent such offense shall be punished by imprisonment in the state prison for life or for any term of years, but not less than 15 years. No person serving a sentence for a second or subsequent such offense shall be eligible for furlough, temporary release, or education, training or employment programs established outside a correctional facility until such person shall have served two-thirds of such minimum sentence or if such person has two or more sentences to be served otherwise than concurrently, two-thirds of the aggregate of the minimum terms of such several sentences.

For the purposes of prosecution, the offense described in subsection (b) shall be a lesser included offense to that described in subsection (a).

c) A law enforcement officer who has sexual intercourse with a person in the custody or control of the law enforcement officer shall be found to be in violation of subsection (b), provided, however, that for the purposes of this subsection, "sexual intercourse" shall include vaginal, oral or anal intercourse, including fellatio, cunnilingus or other intrusion of a part of a person's body or an object into the genital or anal opening of another person's body.

In a prosecution commenced under this subsection, a person shall be deemed incapable of consent to sexual intercourse with such law enforcement officer.

For the purposes of this subsection, "law enforcement officer" shall mean a police officer, an auxiliary, intermittent, special, part-time or reserve police officer, a police officer in the employ of a public institution of higher education pursuant to section 5 of chapter 15A, a public prosecutor, a municipal or public emergency medical technician, a deputy sheriff, a correction officer, a court officer, a probation officer, a parole officer, an officer of the department of youth services, a constable, a campus police officer who holds authority as a special state police officer or a person impersonating any of the foregoing.